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IN THE SUPREME COURT OF THE UNITED STATES

GWENDOLYN MITCHELL, Warden, *Petitioner*,

v.

SHIRLEY REE SMITH, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

In a state prosecution of respondent for causing the death of an infant, three prosecution medical experts opined, based on autopsy results, that the child had died from brain injury caused by shaking. Two defense experts disputed the validity of the prosecution's expert testimony. In federal habeas corpus proceedings, the Ninth Circuit Court of Appeals held, on the basis of the defense expert opinion, that there was insufficient evidence to support the state criminal conviction and that the state appellate court had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("*Jackson*") in upholding it.

The question presented is:

Whether the deferential standard for habeas corpus review under 28 U.S.C. § 2254(d) allows a federal court to grant relief on an insufficient-evidence claim by accepting the expert testimony of defense experts over the contrary opinions of prosecution experts believed by the jury and found sufficient by the state appellate court.

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS AND JUDGMENTS BELOW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
JURISDICTION	2
STATEMENT OF THE CASE	2
1. *State criminal proceedings*	2
2. *Federal Habeas Corpus Proceedings*	6
REASONS FOR GRANTING THE PETITION	8
BY SUBSTITUTING ITS OWN RESOLUTION OF THE CONFLICT BETWEEN EXPERT WITNESSES FOR THAT OF THE JURY, THE NINTH CIRCUIT VIOLATED SETTLED RULES OF REVIEW OF JURY FINDINGS, AND THE RULE OF DEFERENCE TO STATE-COURT ADJUDICATIONS MANDATED BY 28 U.S.C. § 2254(D)(1)	8
1. *The Ninth Circuit violated the principles of constitutional sufficiency review of conflicting expert opinions defined in Jackson v. Virginia*	10
2. *The Ninth Circuit failed to accord the deference due to the state court adjudication denying relief required by AEDPA*	12
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Aucoin v. Jones, 759 F.2d 449 (5th Cir. 1985)	13
Bottoson v. Moore, 234 F.3d 526 (11th Cir. 2000)	14
Brewer v. Overberg, 624 F.2d 51 (6th Cir. 1980)	14
Brown v. Payton, 544 U.S. 133 (2005)	8
Duncan v. Walker, 533 U.S. 167 (2001)	16
Early v. Packer, 537 U.S. 3 (2002)	9
Garcia v. Carey, 395 F.3d 1095 (9th Cir. 2005)	9
Glasser v. United States, 315 U.S. 60 (1942)	11, 15
Goldyn v. Hayes, 444 F.3d 1062 (9th Cir. 2006)	9
Harding v. Bock, 107 Fed. Appx. 471 (6th Cir. 2004)	14
Jackson v. Virginia, 443 U.S. 307, 319 (1979)	6, 9, 10

TABLE OF AUTHORITIES (continued)

	Page
Juan H. v. Allen, 408 F.3d 1262 (9th Cir. 2005), *cert. den.*, 126 S. Ct. 1142, 163 L. Ed. 2d 1000 (2006)	9, 10
Knapp v. Leonardo, 46 F.3d 170 (2d Cir. 1994)	14
Lockyer v. Andrade, 538 U.S. 63 (2003)	8
Mickens v. State, 277 Ga. 627, 593 S.E.2d 350 (2004)	15
Middleton v. McNeil, 541 U.S. 433 (2004)	8
Miller v. Leapley, 34 F.3d 582 (8th Cir. 1994)	14
Miller-el v. Cockrell, 537 U.S. 322 (2003)	16
Moore v. Duckworth, 443 U.S. 713 (1979)	11
People v. Bolin, 18 Cal. 4th 297, 75 Cal. Rptr. 2d 412 (1998)	6
People v. Johnson, 26 Cal. 3d 557, 162 Cal. Rptr. 431 (1980)	11

TABLE OF AUTHORITIES (continued)

	Page
People v. Ledesma, 39 Cal. 4th 641, 47 Cal. Rptr. 3d 326 (2006)	15
People v. Marshall, 15 Cal. 4th 1, 61 Cal. Rptr. 2d 84 (1997)	15
People v. Poe, 74 Cal. App.4th 826, 88 Cal. Rptr. 2d 437 (1999)	15
People v. Wolff, 61 Cal. 2d 795, 40 Cal. Rptr. 271 (1964)	15
Rice v. Collins, 126 S. Ct. 969 (2006)	9, 12, 13
Riner v. Commonwealth, 286 Va. 296, 601 S.E.2d 555 (2004)	16
Smith v. Mitchell 437 F.3d 884 (9th Cir. 2006)	1, 7
Smith v. Mitchell 453 F.3d 1203 (9th Cir. 2006)	1, 7-10
State v. Sosa, 921 S.2d 94 (La. 2006)	16
State v. Trask, 234 Mont. 380, 764 P.2d 1264 (1988)	15

TABLE OF AUTHORITIES (continued)

	Page
Strickland v. United States, 316 F.2d 656 (D.C. Cir. 1963)	15
United States v. Boynton, 63 F.3d 337 (4th Cir. 1995)	14
United States v. Bramlet, 820 F.2d 821 (7th Cir. 1987)	14
United States v. Oliver, 278 F.3d 1035 (10th Cir. 2001)	14
United States v. Segna, 555 F.2d 226 (9th Cir. 1977)	15
Weeks v. Scott, 55 F.3d 1059 (5th Cir. 1995)	13
Woodford v. Visciotti, 537 U.S. 19 (2002)	8
Woodford v. Garceau, 538 U.S. 202 (2003)	16
Wright v. West, 505 U.S. 277 (1995)	6, 10, 11
Yarborough v. Gentry, 540 U.S. 1 (2003)	8, 12
Yarborough v. Alvarado, 541 U.S. 652 (2004)	8, 13

TABLE OF AUTHORITIES (continued)

	Page
Statutes	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2254(d)	i, 2, 8, 16
28 U.S.C. § 2254(d)(1)	2, 6, 12
Cal. Penal Code § 273ab	2
Cal. Penal Code § 1127b	15

IN THE SUPREME COURT OF THE UNITED STATES

No.

GWENDOLYN MITCHELL, Warden, *Petitioner*,

v.

SHIRLEY REE SMITH, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

Gwendolyn Mitchell, Warden, California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit granting habeas corpus relief to respondent following her criminal conviction in a California court for the "shaken baby" death of seven-week-old Etzel Glass.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals, reversing the judgment of the district court and remanding with instructions to grant respondent Smith's petition for writ of habeas corpus, is reported at 437 F.3d 884 (9th Cir. 2006). The order of the Court of Appeals denying the Warden's petition for rehearing and suggestion for rehearing en banc is reported at 453 F.3d 1203 (9th Cir. 2006). The judgment of the United States District Court denying habeas corpus relief is unreported. The opinion of the California Court of Appeal, and the California Supreme Court's order denying discretionary review, are unpublished. Each is reproduced in the Appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

JURISDICTION

The opinion of the Court of Appeals was filed on February 9, 2006. Pet. App. F. The Court of Appeals' denial of the Warden's petition for rehearing and suggestion for rehearing en banc was filed on July 14, 2006. Pet. App. G. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. State criminal proceedings

Respondent Smith was charged with inflicting corporal injury that caused the death of her infant grandson, Etzel. (See Cal. Penal Code § 273ab). At the trial the prosecution produced evidence that, on November 29, 1996, respondent Smith, her daughter Tomeka, and Tomeka's children Yolanda, Yondale and seven-week-old Etzel were staying at the home of Smith's sister. When his mother put him to sleep at about 11:30 p.m., Etzel appeared healthy. During the night, Smith brought Etzel to his mother, who was asleep in another room. He was quiet and limp, with orange-colored mucous coming from his nose. At the direction of 911 operators, Etzel's mother attempted CPR. But, when paramedics arrived at 3:36 a.m., Etzel was not breathing and had no pulse. The baby was

pronounced dead at the hospital.

Smith seemed apprehensive to the firefighter who first arrived at the scene. At first, Smith told her daughter that Etzel had fallen off the sofa earlier in the night and that she had picked him up and rocked him to sleep. On December 5, 1996, however, Smith told a social worker that, upon waking up after 3 a.m, she checked Etzel but that he did not respond to her touch. When she picked him up, she said, his head "flopped back." Smith explained to the social worker that at that point, she gave Etzel "a little shake, a jostle" to awaken him. Smith demonstrated the shaking as a smooth rather than jerky motion. But, Smith said, Etzel still failed to respond. When the social worker asked what happened next, Smith said, "Oh, my God. Did I do it? Did I do it? Oh, my God." At that, her daughter turned to Smith and said, "If it wasn't for you, this wouldn't have happened." Smith did not reply.

In a later interview with police, Smith stated that, when she woke up after 3 a.m., she noticed that Etzel's diaper needed changing. She said she picked Etzel up and saw that he had vomit around his mouth and that his head was "flopped back." Etzel was not breathing and did not move. Smith told the police that she "shook" Etzel, but then corrected herself to say that she had "twisted" him back and forth to try to get a response. In her interview with the police, Smith denied telling the social worker that she had "shaken" Etzel.

The prosecution also presented expert opinion testimony of the cause of death. Three Board-certified prosecution experts[1] rendered opinions, based on the autopsy findings of recent trauma, that Etzel had died of Shaken Baby Syndrome.[2]

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1. In California, a physician is Board-certified after practicing a certain number of years in the field of specialty which the given Board regulates, passing written tests administered by the experts of the Board, and successfully sitting for an oral examination by a group of Board-certified specialists.

2. Shaken Baby Syndrome is also known as Shaken Infant Syndrome or SIS, and is the term used in this petition to avoid confusion with Sudden Infant Death Syndrome or SIDS.

They testified that the shaking was so violent that Etzel's death occurred very quickly, closing down his circulation so that some of the effects of the trauma, such as swelling in the brain tissue, did not have time to develop.

Dr. Stephanie Erlich, who at the time of the autopsy was Board-certified in anatomic pathology, clinical pathology and neuropathology, testified that she had found several independent signs of recent trauma during the autopsy on Etzel's body: fresh blood, measuring one or two tablespoons, on the top of the brain; a fresh blood clot between the hemispheres of the brain; recent hemorrhaging around the optic nerves; a small quantity of fresh subarachnoid blood; and a small bruise and recent abrasion at the lower-back part of the infant's head. Based on these findings, Dr. Erlich concluded that the cause of death was the violent shaking characteristic of Shaken Baby Syndrome, which resulted in "shearing or tearing" within the brain and led to a very rapid death. Dr. Erlich testified that any tear in the nerve cells of the brain would not have been apparent in the autopsy because Etzel's instantaneous death would have prevented any further bleeding or swelling.

Dr. Erlich also testified that, although retinal bleeding is found in seventy-five to eighty percent of Shaken Baby Syndrome cases, its absence in this case did not rule out her diagnosis. When asked about other possible causes of death, Dr. Erlich testified that Etzel's injuries could not have been caused by improperly administered CPR, or a fall from a couch to a carpeted floor, or smothering, or shaking after death.

Dr. Eugene Carpenter, who also participated in the autopsy and was Board-certified in forensic, anatomic and clinical pathology, testified that the bleeding on top of Etzel's brain was caused by violent shaking. One indication of this shaking was his finding that "there was a whiplash action of the head on top of the body with the back of the head slamming into the back and the front of the chin slamming into the chest repeatedly so that the vessels on top of the brain tore." Dr. Carpenter testified that the shaking that caused Etzel's death was "so violent that it destroy[ed] the vital centers in the brain" and led to "a quick death." Dr. Carpenter concluded that Etzel's

death occurred too quickly for the brain stem to have been crushed by accumulated blood. As did Dr. Erlich, Dr. Carpenter testified that any tear in the brain stem would not have been apparent in autopsy because Etzel's instantaneous death would have prevented any bleeding or swelling.

Dr. Carpenter also considered other possible causes of death, and found that none of them accounted for the trauma seen in the autopsy. He ruled out death from Sudden Infant Death Syndrome because of the presence of internal trauma, the abrasion of the back of Etzel's head, and the bruise underneath the abrasion. If a child's death is due to Sudden Infant Death Syndrome, there are no such signs of trauma. Dr. Carpenter also testified that, although retinal hemorrhages are often seen in the bodies of victims of Shaken Baby Syndrome, and none were found in the autopsy of Etzel, Shaken Baby Syndrome was not thereby ruled out.

Dr. David Chadwick, Board-certified in pediatrics and the author of scholarly articles on distinguishing childhood death by falls from death by abusive injury, testified that "old" trauma found during the autopsy had not been the cause of Etzel's death because there was no sign of the necessary specific pathology to link it to the infant's death. Dr. Chadwick too opined that Etzel had died from Shaken Baby Syndrome.

In her defense case, Smith presented two doctors to challenge the opinions of the prosecution's three experts. Dr. William Goldie, who was not Board-certified, opined that the cause of Etzel's death was Sudden Infant Death Syndrome. He testified that death characterized by Shaken Baby Syndrome is due either to massive swelling of the brain or massive bleeding to the brain, neither of which was present in Etzel.

Dr. Richard Siegler, who was Board-certified only in anatomic pathology, did not agree that the death was due to Sudden Infant Death Syndrome; he opined that the death indeed was caused by traumatic brain injury, but resulted from an injury that occurred prior to the night of Etzel's death. Dr. Siegler ruled out Shaken Baby Syndrome because of the absence of retinal hemorrhaging. On cross-examination, however, Dr. Siegler acknowledged that retinal hemorrhaging was not found in all shaken baby cases.

In Dr. Siegler's opinion, it was impossible to determine whether the cause of death was attributable to the recent or the old trauma. He disagreed with the prosecution experts' opinion that the death had been caused by direct, recent damage to the brain. In his opinion, the prosecution experts' testimony regarding the cause of death was "a fantasy." Although he acknowledged on cross-examination that the prosecution experts' opinion as to cause of death was "possible," he testified that there was "no way to confirm it or deny it."

The jury found Smith guilty as charged. The court sentenced her to prison for a term of 15 years to life.

On direct review, the California Court of Appeal rejected Smith's claim that the evidence of cause of death was insufficient as a matter of constitutional law under *People v. Bolin*, 18 Cal. 4th 297, 331, 75 Cal. Rptr. 2d 412 (1998) (applying the *Jackson* standard). After a detailed examination of the testimony of all of the expert witnesses, the appellate court explained that, because the ultimate opinions regarding the cause of death were in conflict, "(i)t was for the jury to resolve the conflicts. The credited evidence was substantial and sufficient to support the jury's conclusion that Etzel died from Shaken Baby Syndrome." Pet. App. A. The California Supreme Court denied discretionary review. Pet. App. B.

2. Federal Habeas Corpus Proceedings

Smith filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. She again claimed that her conviction violated due process because the evidence of the cause of death was constitutionally insufficient. Applying the deferential review standard of 28 U.S.C. § 2254(d)(1), the magistrate judge recommended that the claim be denied with prejudice because the California Court of Appeal's rejection of Smith's claim had been neither contrary to, nor an unreasonable application of, this Court's precedents of *Jackson*, 443 U.S. at 324, and *Wright v. West*, 505 U.S. 277, 296-97 (1995). The magistrate concluded that the California appellate court reasonably found

sufficient evidence based on several factors: Smith was alone with the child at the time of his death; Smith admitted that she shook Etzel when he appeared to be unconscious; three medical experts testified that Etzel died of Shaken Baby Syndrome; and, at least once, Smith made statements that could be interpreted as admissions of guilt. The magistrate noted that, in a habeas corpus proceeding, the federal court could not substitute its judgment for the jury's resolution of the conflicts between the prosecution and defense experts. Pet. App. C. The district court adopted the magistrate's recommendation. Pet. App. D and E.

In a published decision authored by Judge Canby, a panel of the Ninth Circuit Court of Appeals reversed and ordered the District Court to grant the writ. The panel held that the California Court of Appeal had unreasonably applied the *Jackson* test. The panel asserted that the prosecution witnesses had not identified Etzel's death as occurring in the "usual manner" of Shaken Baby Syndrome deaths. The panel expressed the view that, because one defense expert had opined that physical evidence in the form of torn brain stem tissue was necessary to a finding of Shaken Baby Syndrome, and no such physical evidence was found in the autopsy, "there simply was no evidence to permit an expert conclusion one way or the other" regarding cause of death. As there was said to be "no other evidence supporting death by violent shaking," the panel concluded that "no rational trier of fact" could have found that Smith was responsible for Etzel's death. Pet. App. F.; *Smith v. Mitchell*, 437 F. 3d at 888-90.

The Ninth Circuit denied the Warden's petition for rehearing and hearing en banc, but five judges dissented. Their dissenting opinion, authored by Judge Bea, observed that

> the prosecution's experts based their opinions on the evidence of recent trauma to Etzel's brain, and explained how a rapid death would result in brain-stem tearing that could not be seen. When the defense's experts disputed the validity of this hypothesis, it was for the jury to resolve the conflicting opinions.

Pet. App. G; *Smith v. Mitchell*, 453 F.3d at 1203 (Bea, J.,

dissenting from denial of rehearing en banc). In a careful review of the record, the dissenters showed that the prosecution experts had based their finding that violent shaking killed Etzel on the presence of compelling evidence of recent trauma *other* than brain stem tearing. In other words, the "physicians called by the prosecution reached their conclusion *despite* the lack of visible shearing, not because of it, and explained why." Pet. App. G; *Smith v. Mitchell*, 453 F.3d at 1206.

The dissent concluded that the panel's "rejection of qualified expert opinions distorts *Jackson* and contravenes AEDPA's required deference. . . ." Pet. App. G; *Smith v. Mitchell*, 453 F.3d at 1208.

REASONS FOR GRANTING THE PETITION

BY SUBSTITUTING ITS OWN RESOLUTION OF THE CONFLICT BETWEEN EXPERT WITNESSES FOR THAT OF THE JURY, THE NINTH CIRCUIT VIOLATED SETTLED RULES OF REVIEW OF JURY FINDINGS, AND THE RULE OF DEFERENCE TO STATE-COURT ADJUDICATIONS MANDATED BY 28 U.S.C. § 2254(D)(1)

In a lengthening string of cases, this Court has repeatedly corrected the Ninth Circuit's failure to abide by the stringent limits on its power to grant habeas corpus relief in cases governed by the deferential standard of review defined in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), and specifically its persistent failure to defer to the state court's objectively reasonable applications of clearly established federal law.[3/]

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3. *E.g., Brown v. Payton*, 544 U.S. 133, 140-46 (2005); *Yarborough v. Alvarado*, 541 U.S. 652, 664-66 (2004); *Middleton v. McNeil*, 541 U.S. 433, 436 (2004); *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (*per curiam*); *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003); *Woodford v. Visciotti*, 537 U.S. 19, 26-37 (2002) (*per*

Here, the Ninth Circuit violated a cardinal rule of review of a jury's resolution of disputes between expert witnesses, established long before AEDPA in *Jackson v. Virginia* and in other state and federal precedents. And it disregarded once again AEDPA's separate and additional limitations on federal review of state convictions. In doing so, the Ninth Circuit has added to a growing line of published cases granting habeas relief from state convictions—despite the AEDPA deference standard—on claims of "insufficient evidence." E.g., *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005), *cert. den.*, 126 S. Ct. 1142, 163 L. Ed. 2d 1000 (2006); *see also Goldyn v. Hayes*, 444 F.3d 1062, 1063 (9th Cir. 2006); *Garcia v. Carey*, 395 F.3d 1095 (9th Cir. 2005).

This case involved a straightforward contest of experts on the key issue of cause of death. The jury, obviously, believed the prosecution experts. But, in purporting to apply *Jackson*, 443 U.S. at 324, the Ninth Circuit directly overrode the jury's decision crediting the testimony of those experts. Indeed, the Ninth Circuit held that it was not only erroneous but "objectively unreasonable" for the state appellate court to find that a rational finder of fact might have *disbelieved* the opinion of the defense experts on the critical issue of cause of death. In other words—even in a posture in which the federal court's review should be *doubly deferential*, see pp. 12-14, *post*—the Ninth Circuit rejected the jury's finding and the state appellate court's adjudication as unreasonable.

As Judge Bea pointed out in the dissent below, these two basic analytical errors have a compound effect. As for the first error, the dissent correctly observed:

> Our court simply accepts the defense theory and rejects the prosecution's evidence. The jury was perfectly able to do just that. But when our court does it, it steps over the line dividing the province of the jury from that of the court.

Pet. App. G; *Smith v. Mitchell*, 453 F.3d at 1203 (Bea, J.,

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curiam); *Early v. Packer*, 537 U.S. 3, 11 (2002) (*per curiam*); see, *e.g.*, *Rice v. Collins*, 126 S. Ct. 969, 971-76 (2006).

dissenting from denial of rehearing en banc).

But it was the second error that gives this case important added significance. As the dissent also explained:

> This decision would be bad enough were we reviewing a district court's judgment. But here, it is doubly bad for we are reviewing a state court decision under the Antiterrorism and Effective Death Penalty Act ("AEDPA") [footnote omitted] which severely restricts the scope of our review, and mandates that "we apply the standards of *Jackson* with an additional layer of deference." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005), *cert. den.*, 126 S. Ct. 1142, 163 L. Ed. 2d 1000 (2006).

Id. Certiorari should be granted to correct these two fundamental errors in order to prevent this "doubly bad" decision from being used as precedent, and to remind the Ninth Circuit once again that its habeas powers do have limits.

1. *The Ninth Circuit violated the principles of constitutional sufficiency review of conflicting expert opinions defined in Jackson v. Virginia*

When a defendant claims that the evidence produced at trial is constitutionally insufficient to sustain the conviction, the familiar standard of review is whether any rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. The leading principles of the *Jackson* test were summarized in *Wright v. West*:

> In *Jackson*, we emphasized repeatedly the deference owed to the trier of fact, and, correspondingly, the sharply limited nature of constitutional sufficiency review. We said that "*all of the evidence* is to be considered in the light most favorable to the prosecution," 443 U.S. at 319 (emphasis in original); that the prosecution need not affirmatively "rule out every hypothesis except that of guilt," *id.*, at 326; and that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume–even if it does not affirmatively

> appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution," *ibid.*

West, 505 U.S. at 318-19 (plurality op.).

Even if this case had been decided on *de novo* review before the enactment of AEDPA, the Ninth Circuit's decision would have been wholly untenable. The Ninth Circuit violated the most basic aspect of *Jackson* review, embodied in the familiar substantial evidence test when it re-weighed the conflicting expert testimony and substituted its view that the defense experts were more persuasive than the prosecution experts for the jury's view. *Glasser v. United States*, 315 U.S. 60, 79 (1942); *People v. Johnson*, 26 Cal. 3d 557, 576-77, 162 Cal. Rptr. 431 (1980).

The substantial evidence rule, and the deference that it mandates, applies to judicial review of a jury's resolution of conflicts in expert witness opinion testimony. In *Moore v. Duckworth*, 443 U.S. 713 (1979), for example, this Court considered a challenge to the sufficiency of evidence to prove sanity in a case in which the prosecution relied upon lay witnesses alone, and did not produce any expert testimony to rebut the defendant's expert opinion testimony. The Court observed that Indiana law provided that sanity may be established by either expert or lay testimony, and found that

> [t]he state appellate court, in an opinion thoroughly discussing the record evidence and the petitioner's sufficiency challenge, concluded that the lay evidence in this case could have been credited by the jury, and it held that the State's evidence was fully sufficient to support a jury finding beyond a reasonable doubt that the petitioner was sane at the time of the killing.

Id. at 714. In other words, the state jury's decision to completely reject the only expert opinion testimony in a case, and to choose instead to credit lay evidence is entitled to deference under *Jackson*.

2. The Ninth Circuit failed to accord the deference due to the state court adjudication denying relief required by AEDPA

Under *Jackson* itself, federal review of a state conviction for sufficiency of evidence is deferential under the "any rational factfinder" standard. Under AEDPA, a federal habeas court's review of a state court's adjudication of a sufficiency claim must also be deferential, and the court may grant relief under 28 U.S.C. § 2254(d)(1) only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The existence of this second layer of protection for state court adjudications means that a federal habeas court's review of a state court's adjudication of *Jackson* sufficiency claims under AEDPA demands additional insulation, such as that which this Court has already found applicable in the review of ineffective assistance claims. Thus, in *Yarborough v. Gentry*, 540 U.S. at 4, this Court held that judicial review of a defense attorney's performance is "highly deferential—and *doubly deferential* when it is conducted through the lens of federal habeas."

Although giving lip service to the additional layer of deference imposed by AEDPA, the panel decision in this case gives no indication of deference of any kind. Instead, the decision shows that the Ninth Circuit has failed to follow the lesson this Court offered just last term in *Rice v. Collins*, 126 S. Ct. 969. There, although this Court found that the Ninth Circuit had "recited the proper standard of review," the Ninth Circuit panel had proceeded to ignore that standard and then substituted its own evaluation of witness credibility for the conclusions of the state fact-finder. *See Rice*, 126 S. Ct. at 973. In correcting this error, this Court explained that "[the] panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Rice*, 126 S. Ct. at 976. The panel in this case did not learn this lesson; nor did it appear to heed this Court's reiterated observation that the Ninth Circuit in *Rice* had once again

misapplied the "settled rules that limit its role and authority" in AEDPA cases. *Id.* at 972.

Here, the California Court of Appeal's treatment of conflicting expert-opinion testimony under the general *Jackson* standard fell within the matrix of the sufficiency-of-evidence jurisprudence of this Court, see pages 11-12, *ante*, and of other federal and state courts. *See Yarborough v. Alvarado*, 541 U.S. at 663-65. Simply put, the strong consensus is that reviewing courts are not empowered to make their own assessment of which experts are more persuasive or credible, or which expert hypothesis seems more apt or accurate.

Thus, in *Aucoin v. Jones*, 759 F.2d 449, 450 (5th Cir. 1985), the Fifth Circuit demonstrated its correct and reasonable understanding that, under *Jackson*, a reviewing court on habeas cannot second-guess the properly admitted conclusions of an expert witness believed by the jury. *Aucoin* dismissed the petitioner's claim as follows:

> [P]etitioner contends that because of evidence that she was on drugs at the time that she murdered her young daughter, the evidence could not have been sufficient to permit a proper finding that she was capable of forming the requisite specific intent to kill. A psychiatric expert testified, however, that in his professional opinion she was capable of forming that intent despite her drugged condition. *There it ends.*

Id. at 450 (emphasis added).

Another case from the Fifth Circuit engaged in a similar analysis. In *Weeks v. Scott*, 55 F.3d 1059 (5th Cir. 1995), a defendant contended that insufficient evidence supported his conviction for attempted murder, because a "mountain" of evidence contradicted the opinions of multiple prosecution experts that the H.I.V. virus could be spread by saliva. *Weeks* noted that "differences in opinion go to the weight of the evidence, not to its admissibility, and such disputes are within the province of the jury to resolve." *Id.* at 1063. Thus, applying *Jackson*, *Weeks* concluded that although the defense "made a mighty effort to discredit the State's experts, the jury still chose to believe their testimony. We are not in a position to disturb its conclusions." *Id.* at 1064.

Similarly, the Fourth Circuit recognizes that a court applying *Jackson* does not have the option of re-weighing the evidence to determine which expert was correct, but must view the evidence in the light most favorable to the judgment. *United States v. Boynton*, 63 F.3d 337, 346 (4th Cir. 1995) (where prosecution and defense experts conflicted regarding agricultural practice, evidence was viewed in light most favorable to conviction). The recognition is the same in Sixth Circuit. *Brewer v. Overberg*, 624 F.2d 51, 53 (6th Cir. 1980) (sufficient evidence for murder conviction where conflicting expert testimony regarding accidental firing of gun was viewed in light most favorable to the state in conjunction with other evidence); *see also Harding v. Bock*, 107 Fed. Appx. 471, 477 (6th Cir. 2004) (due process not violated by jury crediting testimony of prosecution expert witnesses regarding cause of death where all experts had the opportunity to present medical data supporting their conclusions). The Tenth Circuit agrees. *United States v. Oliver*, 278 F.3d 1035, 1043 (10th Cir. 2001) (conflicting expert testimony is "solely within the provice of the jury" to weigh and resolve). The Eleventh Circuit formulates the principle governing the review of a jury's resolution of an expert conflict as a credibility determination: "Where there is conflicting testimony by expert witnesses, as here, discounting the testimony of one expert constitutes a credibility determination, a finding of fact." *Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir. 2000).

The Second Circuit, reviewing a case in which prosecution and defense experts gave directly conflicting testimony concerning time of death, emphasized that the "jury was free to credit the expert testimony of the prosecution's witness" and to discount the defense evidence. *Knapp v. Leonardo*, 46 F.3d 170, 178 (2d Cir. 1994). The Eighth Circuit adhered to the same principle in another case where competing experts disagreed as to time of death. *Miller v. Leapley*, 34 F.3d 582, 586 (8th Cir. 1994). The Seventh Circuit also abides by this settled principle of review. *United States v. Bramlet*, 820 F.2d 821, 854 (7th Cir. 1987) (given directly conflicting expert testimony on sanity, the jury could have properly credited the government's experts while discounting defendant's experts).

The District of Columbia Circuit has similarly recognized that the resolution of conflicting expert opinion is a question of fact for the jury. *Strickland v. United States*, 316 F.2d 656, 656 (D.C. Cir. 1963). Even the Ninth Circuit, thirty years ago, held that it was up to the jury to resolve the conflict when defense and prosecution experts disagreed. *United States v. Segna*, 555 F.2d 226, 230 (9th Cir. 1977), *citing Glasser v. United States*, 315 U.S. at 80.

Settled California law holds that the determination of whether to credit expert testimony, and how, and to what degree, is within the exclusive province of the jury. *See People v. Ledesma*, 39 Cal. 4th 641, 47 Cal. Rptr. 3d 326 (2006); *People v. Marshall*, 15 Cal. 4th 1, 31-32, 61 Cal. Rptr. 2d 84 (1997); *People v. Wolff*, 61 Cal. 2d 795, 40 Cal. Rptr. 271 (1964); *People v. Poe*, 74 Cal. App.4th 826, 831, 88 Cal. Rptr. 2d 437 (1999). Indeed, this approach has been codified in Section 1127b of the California Penal Code, which directs trial courts to issue the following instruction to juries in criminal trials:

> Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion if it shall be found by them to be unreasonable.

Other state courts approach *Jackson* review of expert witness conflicts in the same way. For example, in *State v. Trask*, 234 Mont. 380, 764 P.2d 1264, 1267 (1988), the Montana Supreme Court applied the principle that "the interpretation of an expert witness's opinion and the amount of weight given to that opinion compared to the other evidence presented is within the province of the trier of fact." *Id.* In accordance with *Jackson*, *Trask* looked to the other, non-expert opinion evidence credited by the jury and held that sufficient evidence of the "purposefully or knowingly" element of the crime supported the verdict. *Id.*; *see also Mickens v. State*, 277

Ga. 627, 629, 593 S.E.2d 350, 352-53 (2004) (conflicting expert testimony on cause of fire to be resolved by jury); *State v. Sosa*, 921 S.2d 94, 100 (La. 2006) (same); *Riner v. Commonwealth*, 286 Va. 296, 329-30, 601 S.E.2d 555, 574 (2004) (same).

These cases demonstrate that California's treatment of expert testimony can hardly be condemned as unreasonable under § 2254(d). On the contrary, these cases demonstrate that it is the Ninth Circuit's approach to reviewing conflicting expert-opinion testimony that is aberrant and unsound. And, as reflected in the district court's denial of relief, the state appellate court's opinion was reasonable in this case too. The prosecution experts testified that Etzel's death was due to the violent shaking characteristic of Shaken Baby Syndrome. When considered in combination with the additional non-expert evidence that Smith was alone with Etzel when he died, that she admitted that she shook him when he was unconscious, and that she provided inconsistent and incriminating accounts of her conduct on the night of the death, the evidence rationally supported the verdict, and it was not "objectively unreasonable" for the state court to conclude so under *Jackson's* deferential standard of review.

As this Court has repeatedly emphasized, the purpose of AEDPA's habeas corpus reforms was to place "more, rather than fewer, limits on the power of federal court" to grant habeas corpus relief. *Miller-el v. Cockrell*, 537 U.S. 322, 337 (2003); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Duncan v. Walker*, 533 U.S. 167, 178 (2001). In enacting AEDPA, Congress reformed review of state court adjudications to make it even more deferential than before. Nothing in the Ninth Circuit's opinion demonstrates a deferential review of the state court's deferential review of a jury's resolution of a dispute between experts. On the contrary, the Ninth Circuit did precisely what Congress and this Court have repeatedly forbidden federal habeas courts to do. Based on a cold record, with no opportunity to observe and compare the demeanor and persuasiveness of the testimony of the competing experts, the panel re-weighed the evidence and substituted its own judgment for that of the California jury that accepted the

explanation of the prosecution experts, as well as the judgment of the California appellate court that accepted the jury's decision to credit the testimony of the prosecution witnesses on the issue of cause of death as substantial evidence supporting the judgment of conviction. Neither of these errors, considered separately, should stand uncorrected. When they appear in the same case, and in a string of other cases exhibiting the same errors, correction on certiorari is more urgent.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October 11, 2006

Respectfully submitted,

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APPENDIX - A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

Court of Appeal - Second Dist.
FILED
FEB 10, 2002
Joseph A. Lane, Clerk
_____, Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,	)	B118869
	)	
Plaintiff and Respondent,	)	(Super. Ct.
	)	No. LA026210
	)	
v.	)	
	)	
SHIRLEY REE SMITH,	)	
	)	
Defendant and Appellant.	)	
	)	

APPEAL from a judgment of the Superior Court of Los Angeles County, Darlene E. Schempp, Judge. Affirmed as modified.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Marc J. Nolan and Peggie J. Bradford, Deputy Attorneys General, for Plaintiff and Respondent.

Shirley Ree Smith appeals from her judgment of conviction by jury trial of assault on a child causing death (Pen. Code, § 273ab). [1] She challenges the sufficiency of the evidence to establish the cause of the infant's death and that she had the custody and control of the child at the time of the crime. She argues that the trial court deprived her of a fair trial by repeated disparaging comments about her trial attorney and that the trial court showed favoritism toward the prosecution. She also contends that the trial court made improper comments about the expert witnesses, disparaging the defense experts and favoring the prosecution experts. The Attorney General argues that the judgment must be modified to impose a parole revocation fine under section 1202.45.

We conclude that the verdict is supported by substantial evidence, and that the comments of the trial court do not constitute a basis for reversal. We modify the judgment to impose the parole revocation fine, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL SUMMARY

Appellant is the grandmother of Etzel, the infant victim in this case. At the time of Etzel's death, appellant shared an apartment with her brother, Stephen Keys; her daughter, Tomeka Smith;[2] and Tomeka's children, Yondale, Yolanda, and Etzel. Every day, appellant helped Tomeka care for Yondale, Yolanda and Etzel. At times, appellant, Tomeka, and Tomeka's children stayed with appellant's sister, Renee Townsend. Ms. Townsend had two children, Marcus and Marcellus.

Etzel was born on November 10, 1996 with jaundice and a heart murmur. Both conditions resolved before his death. On November 29, 1996, appellant, Etzel, Yondale, and Yolanda spent the day at Ms. Townsend's apartment. Etzel seemed normal that day, eating well, smiling, moving his arms and legs, and having normal urination and bowel movements. That night, at the Townsend apartment, Tomeka put Etzel to sleep on his stomach on the sofa in the living room after feeding, changing and washing him. Yondale also slept on the sofa. Yolanda slept on a love seat in the same room. Appellant slept on the

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1. All statutory references are to the Penal Code unless otherwise indicated.

2. We refer to Ms. Tomeka Smith as "Tomeka" to avoid confusion with her mother.

floor near the sofa. Ms. Townsend left for work when Tomeka put Etzel down to sleep. Marcus and Marcellus slept in their bedroom.

Usually, when staying at the Townsend apartment, Tomeka also slept in the living room. But on the night of November 29, 1996, she went into Ms. Townsend's room to listen to music and fell asleep. Etzel was fine as of 11:30 p.m. when Tomeka put him down to sleep.

In the early morning hours of November 30, 1996, appellant rushed into the bedroom holding Etzel and wakened Tomeka. Etzel was limp and appeared to have vomit coming from his nose. Appellant said: "Tomeka, Tomeka. Something is wrong with Etzel. . . . [C]all 911." Appellant handed the baby to Tomeka and Tomeka called 911.

Firefighters received the call and responded to the apartment, arriving at 3:36 a.m. Etzel was clothed, lay on the bedroom bed, and had bright red blood in one nostril. He was warm, but was not breathing and his heart was not beating. The firefighters began cardiopulmonary resuscitation and other efforts to revive the baby, without success. An ambulance arrived to transport Etzel to the hospital. Shortly after he arrived at the hospital, Etzel was declared dead.

When an infant dies without obvious signs of trauma, it is standard procedure to declare the death as a Sudden Baby Death Syndrome (SIDS) case, pending autopsy. (We reserve the specific details of the autopsy results for our discussion of appellant's challenge to the sufficiency of the evidence.) After the autopsy was completed, the coroner concluded that the cause of death was not SIDS, but shaken baby syndrome.

On December 5, 1996, a social worker, Linda Reusser, went to the Townsend apartment and told Tomeka and appellant that the cause of death had been changed to shaken baby syndrome. Ms. Reusser asked what had happened. Appellant told her that Yondale had wakened about 3:20 on the morning of November 30, and that she had gone to comfort him. She went over to Etzel and saw he was face down. She touched him and he did not respond. Worried, she picked him up and gave him "a little shake, a jostle" to waken him. Etzel's head was flopped back when she picked him up. He did not respond. Appellant demonstrated for Ms. Reusser that she had picked Etzel up under the armpits with her hands even with her shoulders, and gave him what Ms. Reusser described as "a quick jostle" which was a smooth rather than a jerky motion. At that point, appellant stopped talking.

Ms. Reusser said: "Shirley, what happened next?" Appellant said something like: "'Oh, my God. Did I do it? Did I do it? Oh, my God.'" Ms. Reusser told Tomeka that she was going to remove Yondale and Yolanda from the home while an investigation was conducted.

Los Angeles police officers interviewed appellant on December 9, 1996. She said that Etzel was fine at 11:30 on the night of November 29th. Yolanda fell onto appellant and woke her. Appellant noticed that Etzel needed to be changed, and when she picked him up, his head flopped back and he had vomit around his mouth. At first, appellant said she shook Etzel, and then corrected herself and said that she had twisted the baby to try to elicit a response from him. She said that she shook Etzel for "just a matter of a few seconds." Tomeka told Detective Nancy Nelson that appellant had said that Etzel had fallen earlier in the evening, was fine, and was put back to sleep on the couch.

Appellant was arrested and charged with one count of assault on a child causing death (§ 273ab). At trial, both the prosecution and the defense presented the testimony of medical experts regarding the cause of Etzel's death. We review that testimony in detail in our discussion of appellant's challenge to the sufficiency of the evidence. Appellant was convicted as charged. She was sentenced to a term of 15 years to life in prison. She filed a timely appeal.

DISCUSSION

I

Appellant challenges the sufficiency of the evidence to support her conviction. The standard of appellate review is well established. "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

A

Appellant's first challenge is to the evidence of the cause of Etzel's death. She contends the evidence was not sufficient to establish that he died from shaken baby syndrome. She relies heavily upon various medical publications regarding shaken baby syndrome, which she concedes were not presented in evidence at trial. We decline to

consider matters outside the record of the trial. (See *People* v. *Peevy* (1998) 17 Cal.4th 1184, 1207 ["[T]he general rule [is] that an appellate court generally is not the forum in which to develop an additional factual record, particularly in criminal cases when a jury trial has not been waived."].)

Dr. Eugene Carpenter, a medical examiner for the Los Angeles County Coroner, testified at trial that Etzel did not die from SIDS. He died from trauma. Dr. Carpenter explained that if death is from SIDS, there are no bruises, abrasions, or signs of internal trauma.

The autopsy revealed that Etzel had blood on the top of his brain, an abrasion on the lower left back of the head, and a bruise underneath the abrasion. The bruise was relatively small, and was not sufficient in itself to explain the cause of death. There was also a small amount of blood between the two halves of the brain. In addition there was a small amount of blood in the posterior fossa (at the base of the skull). There was also older blood which may have been a sign of an older injury which occurred days or weeks prior to death. There was no indication of heart or liver disease.

The autopsy also revealed hemorrhages of the optic nerves on both sides of the brain. The hemorrhages were recent. There was also subarachnoid and subdural hemorrhaging at the bottom of the brain. Dr. Carpenter explained that the dura is the thick covering of the brain and that the subarachnoid is a very thin cellophane-like covering of the brain itself.

Dr. Carpenter testified that the bleeding on top of Etzel's brain was caused by violent shaking so "there was a whiplash action of the head on top of the body with the back of the head slamming into the back and the front of the chin slamming into the chest repeatedly so that the vessels on top of the brain tore. [¶] And bleeding started at the top right part of the brain. And also the brain was so damaged from this violent shaking that death occurred relatively quickly, within . . . 30 minutes. [¶] But there was no significant delay between the shaking and the brain damage. The bleeding was not much. [¶] There are two ways that . . . shaking to the head can cause death. One way is that the shaking itself is so severe that the brain tears in vital areas that control the heartbeat and the breathing. [¶] And then the bleeding can be small and won't amount to that much. [¶] The other way that a baby's body can die from shaking or from head trauma is for the vessels to tear, but for the brain not to be damaged that much. And for the blood

to accumulate on top of the head. [¶] There is not enough room in the skull for the brain and the blood. So the brain is pressed downward into the spinal canal and is crushed and that dies."

Dr. Carpenter explained that in Etzel's case there was not enough blood to press the brain downward, and that death therefore was a result of direct trauma to vital areas of the brain before there was enough accumulation of blood to cause death from pressure on the brain. Dr. Carpenter said that he could not rule out the possibility of other blows to the head, but that there was no clear evidence of such blows except for the one small area of bruising. He testified that a fall from the sofa in the Townsend apartment could not account for the injuries to Etzel's head. He also said that the injuries could not have been caused by the administration of CPR. Dr. Carpenter testified that during the last moments of life in an infant there would be a release of feces and regurgitation of stomach contents. The jury was shown a diagram (People's Exh. 12) portraying a whiplash shake injury syndrome in an infant.

Dr. Carpenter testified that retinal hemorrhages are often seen in the bodies of infants who are the victims of shaken baby syndrome. There were no retinal hemorrhages in Etzel's eyes. There was evidence of old bleeding in the optic nerve on the right side of the brain.

On cross-examination, defense counsel established that Dr. Carpenter's trial testimony was inconsistent with his testimony at the preliminary hearing regarding whether he was present for the entire autopsy of Etzel, which was performed by Dr. Stephanie Erlich. Dr. Carpenter also testified on cross-examination that fractures are common in babies who have been shaken, but there were no fractures on Etzel. Dr. Carpenter said that subdural or subarachnoid hemorrhage could manifest in babies that suffer birth trauma. He also said that such injuries could result from a fall in which the baby strikes its head against an object.

Dr. Erlich, the autopsy surgeon, also testified. At the time she conducted the autopsy on Etzel, she was an associate deputy medical examiner. She was doing a one-year fellowship in forensic pathology to obtain board certification in that field. She was board certified as a neuropathologist and in anatomic pathology. She was certified as a clinical pathologist in 1996.

Dr. Erlich corroborated Dr. Carpenter's testimony about the autopsy findings on Etzel. She added that bilateral plural petechia were found in the lining around the lung. She explained that the subdural hemorrhages were found in the back of the head, the occipital area, and in the bottom of the skull. There was subarachnoid hemorrhaging in the occipital areas, in both frontal areas, in the right parietal area, and on the left temporal lobe.

Dr. Erlich and Dr. Hidelo Itabashi performed a neuropathological examination on Etzel's brain. They confirmed the presence of fresh subarachnoid hemorrhages in the parietal areas, the occipital areas, the frontal areas, and in the left temporal area. They also confirmed the presence of fresh subdural hemorrhage in the parietal area, as well as an older subdural hemorrhage in the right parietal area. Dr. Erlich testified that the cause of death was trauma to the brain. On cross-examination, Dr. Erlich testified that this was her first autopsy on a victim of shaken baby syndrome. She said that the fresh blood found on Etzel's brain could not be the result of rebleeding from an earlier trauma. Dr. Erlich notified the police of the autopsy findings. On redirect, Dr. Erlich testified that the injuries to Etzel's brain could not have occurred as the result of shaking after death.

The defense presented testimony that neither of the firefighters who came to the apartment nor the investigator for the coroner saw trauma on Etzel's body. Rene Townsend testified that appellant only corrects the children verbally, does not have a temper, and that on the night of Etzel's death, everyone was in a festive Thanksgiving mood. She said that the social worker, Ms. Reusser, accused appellant of causing Etzel's death.

Dr. Richard Siegler testified that Etzel died from brain trauma, but that it was not the result of shaken baby syndrome because there was no retinal hemorrhaging. He disagreed with Dr. Carpenter and Dr. Erlich that death was the result of direct damage to the brain. Dr. Siegler testified that the brain trauma was not something that happened just a few hours before death. He said there was no fresh trauma. He also testified that old bleeding tends to draw in new bleeding.

On voir dire, the prosecutor established that Dr. Siegler's extensive experience was not in forensic pathology, but in general, clinical and anatomic pathology. Ninety-five percent of his publications have been on cancer. He had not authored any articles dealing with child abuse or forensic pathology in determining the causes of death in infants.

Although he had been a medical examiner in Philadelphia in 1960, shaken baby syndrome was unknown at that time. He had not been involved in any autopsies where the cause of death was found to be shaken infant syndrome. He had performed 50 autopsies on children with brain trauma over the last 25 years.

On cross-examination, Dr. Siegler said that he did not believe the cause of death was SIDS. After discussing an article on which Dr. Siegler had relied in his report for the defense, the prosecutor referred to a particular passage and asked: "So you would agree, then, Doctor, that just because there are no retinal hemorrhages that does not exclude that it is a shaken baby. Would you agree with that?" Dr. Siegler answered: "That's correct." He went on to say that you can diagnose shaken baby syndrome without a finding of retinal hemorrhages if there is a report that the baby was in fact shaken. He said that a diagram prepared by Dr. Carpenter and Dr. Erlich at trial showed that there was extensive fresh bleeding to the brain, which was not depicted in the neuropathologist's photographs of Etzel's brain. The neuropathologist's photographs were the basis for Dr. Siegler's conclusion that death was caused by old trauma.

Dr. Erlich was called by the defense. She repeated her testimony that there was both old and new blood in the subdural area of Etzel's brain. She believed the cause of death was direct damage to the brain. She agreed that retinal hemorrhaging is present in 70 to 85 percent of shaken infant syndrome cases.

Dr. William Goldie, a pediatric neurologist, testified for the defense. He had spoken on survivors of shaken baby syndrome. He is not board certified in neuropathology, clinical pathology, or in forensic pathology. He testified that death from shaken baby syndrome is due to either massive swelling of the brain or massive bleeding to the brain. He also testified that the fact that Etzel had jaundice, a heart murmur, and low birth weight were factors to make an infant more disposed to dying from SIDS. He concluded that the pathologists had not been able to determine the cause of Etzel's death. He believed that some of the bleeding in the brain could be attributed to the resuscitation efforts. His conclusion was that Etzel died from SIDS.

The expert opinion evidence we have summarized was conflicting. It was for the jury to resolve the conflicts. The credited evidence was substantial and sufficient to support the jury's conclusion that Etzel died from shaken baby syndrome. The conviction is supported by substantial

evidence.

B

Appellant also challenges the sufficiency of the evidence that she had Etzel in her care and custody within the meaning of section 273ab. That statute states: "Any person who, *having the care or custody of a child* who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life."[3/]

Here there is ample evidence that Etzel was under appellant's care and custody at the time he was injured. Appellant was the only adult in the living room with Etzel. She cared for him when he woke earlier in the night, and she picked him up and examined him when she noticed that he was not well. This is sufficient to satisfy the care and custody element of the offense.

II

Appellant contends the trial court engaged in a pattern of disparagement of her trial counsel that resulted in the deprivation of her Sixth Amendment right to the effective assistance of counsel and her Fourteenth Amendment right to a fair trial.

"A trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to a defendant's counsel . . . and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense . . . .' [Citations.]" (*People* v. *Fudge* (1994) 7 Cal.4th 1075, 1107.) The Attorney General argues that appellant failed to preserve this issue by objecting or requesting that the jury be admonished. We agree that appellant was required to object or to seek an admonishment to preserve the issue for appeal. (*Id.* at p. 1108.) As the following discussion points out, counsel did so in some instances, but not in all. We shall, in any event, examine each instance raised by appellant.

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3. The version of section 273ab in effect at the time of this offense provided for a sentence of 15 years to life. It was amended to provide for the 25 years to life term in 1996. (Stats. 1996, ch. 460, § 2.)

A

"'An Hour's Opening Statement.'"

The prosecutor's opening statement is reported in 16 pages of reporter's transcript. During the defense opening statement, when defense counsel was discussing the complicated medical evidence which we have summarized, the trial court said: "Mr. Eriye why don't you quit at that point. You have been going for an hour. My reporter is about to run out of paper and I told the jury, who has not had a recess, that we would recess at 3:30 today." Mr. Eriye responded that he would conclude in five minutes. The trial court said that defense counsel would be given an additional five minutes, after the reporter had put in new paper. After defense counsel had resumed his statement, with no sign of concluding, the trial court interrupted and said: "All right. I am going to recess. An hour's opening statement. And I am afraid that five minutes won't do it." At that point, the defense opening statement was reported in 21 pages of reporter's transcript. The jury was admonished and excused at 3:35 p.m. The following morning, defense counsel concluded his opening statement, which is reflected in another five pages of reporter's transcript.

Appellant argues that the trial court's comment "made defense counsel appear to be so out of line with common practice that he was incompetent. This suggestion was discourteous and disparaging."

We disagree. It would have been better to have done this at sidebar, but misconduct is not shown. The trial court was merely exercising its power to control the trial. (*People* v. *Fudge*, *supra*, 7 Cal.4th at p. 1108.)

B

"'That's not the legal definition.'"

Near the conclusion of defense counsel's opening statement, he said: "So ladies and gentlemen of the jury, I thank you very much for giving me the time to hear. And I believe strongly that the experts and all the witnesses will clearly establish beyond a shadow of a doubt that--" At that point, the court interrupted and said "That's not the legal definition. It is beyond a reasonable doubt."

Appellant argues that the comment was inappropriate because defense counsel was not obligated to provide the legal definition of reasonable doubt. She contends: "Defense counsel was fully entitled to argue that he would prove beyond a shadow of a doubt that his client was innocent, even though that would be far more proof than necessary

to acquit the defendant."

We find no error. The trial court was within its discretion in ensuring that the jury was not confused by the defense counsel's use of a standard different from reasonable doubt.

C

Favoritism Toward the Prosecutor

Appellant argues that the trial court allowed the prosecutor to harass Tomeka Smith (the mother of the child), who testified as a defense witness. The issue in the colloquy cited was what Tomeka had told police officers about the incident, and whether she told them the truth to the best of her recollection. Appellant asserts that defense counsel was cut off when he challenged a police officer with making up a story about Tomeka's statement to him.

This is the colloquy at issue:

"[Defense Counsel]: Now, at the commencement of your testimony you started with a story of what Tomeka told you. You're trying to make up a story, correct?

"[The Prosecutor]: Your honor, we are going to object to that. It is argumentative and it is insulting to this officer and it is unnecessary."

The trial court sustained the objection. We find no error. This was the fourth question asked by defense counsel in his cross-examination of this officer. Defense counsel had not raised any question about the veracity of the officer's account through inconsistencies or memory lapses. In contrast, during the prosecutor's examination of Tomeka, which is cited by appellant, Tomeka repeatedly said that she was unable to remember what she had said to the police. Under these circumstances, the trial court was not showing preferential treatment to the prosecution.

D

"'I Won't Hear Your Argument.'"

Before Dr. Carpenter began his testimony for the prosecution, counsel for the defense (outside the presence of the jury), objected to some of the diagrams the prosecutor planned to use with Dr. Carpenter. He said that some of the diagrams related to shaken baby syndrome and that there had been no evidence yet that Etzel had been shaken. The trial court said that it presumed that the diagrams would become

relevant with the doctor's testimony, and that it did not understand how the defense could object until Dr. Carpenter had testified. The trial court said: "If he testifies and his testimony, for example, doesn't cover that one you're referring to, then it won't be received in evidence. But I don't know until I have heard his testimony."

The prosecutor said that Dr. Carpenter was going to say that what was depicted on the diagram is one of the ways in which infant whiplash shake injury syndrome occurs. The trial court ascertained that the prosecutor planned to use the diagram to assist the jurors in following Dr. Carpenter's testimony. The trial court asked how the coroner [Dr. Carpenter] was going to testify about shaken baby syndrome. The prosecutor interrupted the court and said that Dr. Carpenter is an expert on shaken baby death. Defense counsel objected and said that Dr. Carpenter is not an expert, that he is a pathologist. The trial court said: "I don't know if it is true or not. But we will find out from his testimony. If he isn't I won't allow it in. If she establishes that he is an expert, it will probably be received. [¶] So let's see how the testimony goes before I rule on that."

After this colloquy, Dr. Carpenter testified to his credentials, including the fact that he is a board certified forensic, anatomic, and clinical pathologist. He also testified that he believed that the bleeding on the top of Etzel's brain was caused by violent shaking, which caused a whiplash action of his head. He testified in detail about how shaking a baby can cause death.

After this testimony was given, the prosecutor started to use a chart, which was marked as People's 12. Apparently this is the same diagram to which defense counsel had objected earlier, because he renewed his objection. The trial court said: "Counsel, I won't hear your argument. Isn't this something we took up outside the presence of the jury? I think it is." The prosecutor said: "Yes, it is, Your Honor."

Appellant fails to cite or quote the remainder of the record on this point. In it, the prosecutor went on to lay additional foundation regarding Dr. Carpenter's expertise in the area of shaken infant syndrome before using the chart. After these foundational questions were answered, the prosecutor asked the trial court if it was satisfied. The trial court said yes, and offered counsel for appellant an opportunity to voir dire Dr. Carpenter on his experience with shaken infant syndrome. After defense counsel had asked Dr. Carpenter several questions regarding his qualifications, he asked a substantive question

regarding how long it would take a child to die from shaking and how this would be manifested. At that point, the trial court interrupted counsel and said that this question was beyond the scope of proper voir dire and should be reserved for cross-examination. The trial court ruled that Dr. Carpenter was qualified and allowed the prosecutor to use the diagram in her continued examination.

There was no disparagement of counsel. The trial court properly allowed counsel for the defense to voir dire Dr. Carpenter about the subject matter of the diagram and found that Dr. Carpenter was qualified to testify as an expert witness.

E

"'Counsel, Just Don't Get Lost.'"

During cross-examination of Dr. Carpenter, defense counsel asked a series of questions relating to differences between Dr. Carpenter's trial and preliminary hearing testimony. Defense counsel then asked a series of questions regarding a statement made by Dr. Carpenter to an investigator for the defense. Counsel asked if Dr. Carpenter told the investigator that he had found the bruise on Etzel's head before the autopsy began (this was contrary to Dr. Carpenter's trial testimony). Dr. Carpenter said that he had not said that. He explained: "He [the investigator] asked me what was my memory. I told him my memory, and my memory was that I had found the abrasion at the beginning of the autopsy. [¶] And I had alerted Dr. Erlich that something might be going wrong with this case and that I had stayed there. [¶] But that was not an accurate memory. As Dr. Erlich when asked her memory had a different one, plus she had . . . documentation as to which memory was correct."

Defense counsel then said: "I am a little bit lost here. What you're referring to memory--" The trial court interrupted and said: "Counsel, just don't get lost. He's answered the question. Ask another question."

Appellant argues that the trial court's statement was harsh and unprovoked. We disagree. The trial court was properly exercising its discretion to control proceedings. (*People* v. *Fudge*, *supra*, 7 Cal.4th at p. 1108.)

F

"'Counsel, I will make the rulings, not you.'"

During the direct examination of Dr. Erlich, counsel for the defense objected to a question on the ground that it misstated the evidence. The prosecutor said: "I will restate the question. I don't know if that misstates the testimony or not, but I will restate the question, Your Honor." Counsel for appellant interjected: "It does." The trial court said: "Counsel, I will make the rulings, not you."

Appellant argues that the trial court could have admonished the prosecutor, but only criticized defense counsel. The trial court properly admonished defense counsel. His comment was inappropriate.

G

"'Counsel, keep your comments to yourself.'"

Detective Michelle Robinson of the Los Angeles Police Department testified that she and Detective Nancy Nelson interviewed appellant. A hearing pursuant to Evidence Code section 402 was conducted to determine whether the tape recording of appellant's statement should be excluded because she was not admonished under *Miranda* v. *Arizona* (1966) 384 U.S. 436. The attorneys argued their positions and the trial court ruled that the tape was admissible. Counsel for appellant expressed a concern that portions of the tape recording were not reflected in the written transcript. The trial court said that the jury would be admonished to listen to the recording and would not be given the written transcript.

Before the tape was played to the jury, the trial court told defense counsel that if he had any specific objections to portions of the tape, he should make sure that the portions were excised. The trial court also told counsel for defense to object if he heard a statement on the tape that is not in the written transcript. The trial court said that the jury would be admonished that the transcript was an aid to assist them, but that the tape is the actual testimony, and that the tape would be allowed in the jury room.

The following morning, counsel for the defense asked for a sidebar before the tape of appellant's statement was played to the jury. At sidebar, the trial court noted that it had been "inundated from notes from jurors they are having a time problem . . . ." Counsel for the defense strongly objected to the playing of the tape. He asserted that a substantial portion of the tape had been omitted from the written transcript. The trial court indicated that the jury would not be allowed to use the written transcript. The prosecutor objected, saying that she

had asked counsel weeks before to give her his version of the transcript so the two could be incorporated. Counsel for defense stated that the prosecutor had given him an updated transcript only the day before toward the end of the court session. The trial court told counsel for the defense to furnish the transcript. It said that the jury would be admonished that the transcript was an assist, and that they might receive a second transcript, and would be asked to determine which was correct.

The trial court admonished the jury not to read ahead in the transcript, that defense counsel disagrees with the transcription and has a right to prepare a version which he believes is correct, and that it would be up to the jury to decide what the tape said. The trial court told counsel that if he disagreed with a portion of the transcript, he could object and the tape would be stopped and the detective would be asked if she recalled what was said in the interview. Counsel for the defense said that this procedure was "fine."

After the tape was played, counsel for the defense objected on the grounds of Evidence Code sections 350, 352, 930 and 940. The trial court overruled the objections. In the presence of the jury, after both defense counsel and the prosecutor continued to discuss the tape, the trial court said: "Counsel, keep your comments to yourself. We have taken up proceedings outside the presence of the jury and you know better than that."

Later, during another colloquy at the bench, the trial court said: "[Y]our objections to 930 and 940 we addressed I believe yesterday. It is not a violation of her privilege against self-incrimination and it's clearly admissible."

In her brief, appellant argues that her counsel's comments were proper, and that he was following the court's direction to raise objections as the relevant portion of the tape was being played. We disagree. The Evidence Code objections made by counsel went to the entire tape, rather than to specific portions. The trial court had heard extensive argument following the Evidence Code section 402 hearing on the admissibility of the recording. Counsel should have raised these arguments at that time. The trial court was properly controlling the course of the trial, particularly in light of the jury's concerns about the length of the trial.

H

"'Counsel you had her leaving . . . .'"

During his examination of Rene Townsend, defense counsel asked a series of questions about the social worker's visit to the apartment, and her departure with the children. After several questions about the social worker's departure, counsel for the defense began to ask another question in this area. The trial court interrupted and said: "Counsel you had her leaving for the last 10 minutes. Would you move onto something relevant." The trial court had sustained a number of objections to questions regarding the relevance of the social worker's removal of the other children from the Townsend apartment.

While the trial court's language reveals some impatience, the court was correct that this line of questioning was not relevant. We find neither error nor prejudice.

I

Comment Regarding Examination of Ms. Townsend

Appellant complains that at the conclusion of his direct examination of Ms. Townsend, the trial court said: "One final question and then--you have had her on the witness stand for an hour." We observe that this admonition came after the trial court sustained the prosecution's objections to a series of questions by the defense regarding Ms. Townsend's opinion as to whether appellant would harm the baby. The trial court acted within its authority to control the trial in making its comment to defense counsel.

J

The Daily News Article

As we have noted, the defense recalled Dr. Erlich in its case. During his questioning of this witness, counsel attempted to use an article from the Daily News newspaper. The trial court indicated that it did not seem relevant, but asked to see the article. The prosecutor objected to the article on the grounds of relevance and hearsay. The trial court then sustained the prosecution's objections. It stated that the use of the article is "totally improper" and would not hear argument on it.

The article was not marked as an exhibit, and we do not have a copy of it in the record. Appellant argues that the trial court should not have said that it was "totally improper." Even if the trial court's comment was too harsh, we see no prejudice.

K

Limitations on Defense Examination

Appellant argues that the trial court improperly cut off questioning of Dr. Erlich about the amount of blood present during the autopsy, and how she kept her notes clean. The trial court precluded counsel for the defense from redirect on the subject of Dr. Erlich's statements to the police because this was not within the scope of cross-examination. The ruling appears to be correct. Even if the questions could be regarded as within the scope, it is not likely that it prejudiced the result of the trial.

L

Unfairly Sustained Objections

Appellant argues that the trial court improperly sustained objections to his examination, while granting wider latitude to the prosecution. We have reviewed the instances cited and find no error or improper disparagement. We conclude that appellant was given a fair trial.

We note that the trial court subjected the prosecutor to similar treatment.

III

Appellant argues that the trial court improperly required a greater showing to qualify the defense doctors as expert witnesses than it did to qualify the prosecutor's experts. We disagree.

We have already discussed Dr. Carpenter's qualifications as a board certified forensic, anatomic, and clinical pathologist. These qualifications were sufficient to establish his expertise.

Appellant argues that Dr. Goldie should not have been subjected to such extensive voir dire on his qualifications. On voir dire, the prosecutor established that he was not board certified in pathology, neuropathology, clinical pathology, or forensic pathology. He had worked in neuropathology only as a resident. In light of this testimony, more intensive voir dire of Dr. Goldie regarding his expertise on brain trauma to children was appropriate.

IV

Appellant argues that she was denied her right to a fair trial because of the cumulative errors she raised in her brief. We have found no error. Therefore, the argument cannot prevail.

V

Respondent asks this court to modify the judgment because the trial court failed to impose the mandatory parole revocation fine pursuant to section 1202.45.[4/] Section 1202.45 requires the court to impose a fine in the same amount as that imposed under section 1202.4. We agree that the failure to impose the fine renders the sentence unauthorized. (See *People* v. *Scott* (1994) 9 Cal.4th 331, 354.) Appellant was ordered to pay a restitution fine of $1,000 under section 1202.4, subdivision (8). In the interest of judicial economy, we impose the parole revocation fine rather than remand the case to the trial court. (*People* v. *Hong* (1998) 64 Cal.App.4th 1071, 1084; *People* v. *Walker* (1991) 54 Cal.3d 1013, 1029.)

We modify the judgment to reflect the additional fine of $1,000 required by section 1202.45. That fine is suspended unless and until appellant's parole is revoked.

DISPOSITION

The judgment is modified to impose and suspend a $1,000 parole revocation fine under section 1202.45. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, J.

We concur:

VOGEL (C.S.), P.J.

DAU, J.*
*Assigned by the Chairperson of the Judicial Council.

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4. The issues of whether the failure of a trial court to impose a mandatory fine can be addressed on appeal when it was not raised during trial, and whether an appellate court can impose the minimum fine rather than remand the case to the trial court, are currently under consideration by the Supreme Court. (See *People* v. *Baltazar* (S075450); *People* v. *Parker* (S077360); *People* v. *Tillman* (S077360).)

APPENDIX - B

Second Appellate District, Division Four, No. B118869
S086698

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

THE PEOPLE, Respondent

v.

SHIRLEY REE SMITH, Appellant

SUPREME COURT
FILED
May 10, 2000

Frederick K. Ohlrich
Clerk

_____
Deputy

Appellant's petition for review DENIED.

GEORGE

_____
Chief Justice

APPENDIX - C

FILED
CLERK, U.S. DISTRICT COURT
MARCH 22, 2004
CENTRAL DISTRICT OF CALIFORNIA
BY s/____DEPUTY

DOCKETED ON CM
MARCH 22, 2004
By s/___062

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHIRLEY REE SMITH,	) CASE NO.
	) CV 01-4484-ABC (PJW)
Petitioner,	) REPORT AND
	) RECOMMENDATION OF
	) UNITED STATES
	) MAGISTRATE JUDGE
v.	)
	)
GWENDOLYN MITCHELL,	)
WARDEN	)
Respondent.	)
	)
----------	)

This Report and Recommendation is submitted to the Honorable Audrey B. Collins, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 01-13 of the of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Court deny the Petition and dismiss the action with prejudice.

I.
SUMMARY OF PROCEEDINGS

A. State Court Proceedings

In 1997, Petitioner was convicted by a Los Angeles County Superior Court jury of assault on a child causing death. (Clerk's Transcript ("CT" 480-81.) The trial court sentenced Petitioner to 15 years to life in prison. (CT 483-84.)

Petitioner appealed to the California Court of Appeal, which affirmed the conviction and sentence. (Answer to Petition for Writ of Habeas Corpus ("Answer"), Exhs. A and B.) He then filed a petition for review in the California Supreme Court, which was denied. (Answer, Exhs. C-D.) Petitioner did not seek collateral review in the state courts.

B. Federal Court Proceedings

Thereafter, Petitioner, proceeding pro se, filed a habeas corpus Petition, pursuant to 28 U.S.C. § 2254, and, later, an amended habeas corpus Petition, raising the following claims:

1. There was insufficient evidence to prove that the victim died of shaken baby syndrome.
2. There was insufficient evidence to prove that the victim died while in the "care and custody" of Petitioner.
3. The trial court violated Petitioner's right to effective assistance of counsel and a fair trial.
4. The cumulative effect of the errors at Petitioner's trial violated her right to a fair trial.

(First Amended Petition for Writ of Habeas Corpus ("Petitioner") at 6-7 (including the attached pages hereinafter referred to as 6(1) through 6(34)).)

After Respondent filed an Answer and Petitioner filed a Traverse, the Court appointed counsel for Petitioner. Petitioner's counsel then filed a Supplemental Memoranda of Points and Authorities in Support of Writ of Habeas Corpus ("Supp. P&A") and a Supplemental Traverse ("Supp. Traverse"). Respondent filed a Supplemental Memorandum of Points and Authorities in Support of Answer to Petition for Writ of Habeas Corpus ("Supp. Answer").

II.
STATEMENT OF FACTS[1/]

This tragic case centers on the death of a seven-week old infant Etzel Smith ("Etzel"), and the conviction of Petitioner, his grandmother, for killing him. On October 10, 1996, Petitioner's daughter, Tomeka Smith ("Tomeka"), gave birth to Etzel. He was her third child. On November 29, 1996, Petitioner, Tomeka, and Tomeka's children spent the day with Petitioner's sister, Renee Townsend, at Townsend's apartment. Townsend's children were also in the apartment that day.

Etzel seemed normal that day, eating well, smiling, and moving his arms and legs. That evening, Tomeka fed Etzel, changed his diaper, washed him, and put him to sleep on his stomach on Townsend's living room sofa around 11:30 p.m. After putting Etzel down, Tomeka went into Townsend's room to listen to music and fell asleep, with the bedroom door ajar.

Townsend left for work when Tomeka put Etzel to sleep. Petitioner lay down to sleep on the living room floor near the couch where Etzel lay. Tomeka's other two children were also sleeping in the living room. Townsend's children slept in another room in Townsend's apartment that night.

In the early morning hours of November 30, 1996, Petitioner rushed into Townsend's bedroom holding Etzel and woke up Tomeka. Etzel was limp and appeared to have vomit coming out of his nose. Petitioner told Tomeka something was wrong with Etzel and she should call 911.

Firefighters responded to Townsend's apartment, arriving at 3:36 a.m. When they got there, they found Etzel on the bed in Townsend's bedroom. He was dressed and had bright red blood in one nostril. He was warm, but was not breathing and his heart was not beating. The firefighters began cardiopulmonary resuscitation and other efforts to revive him, without success. An ambulance arrived and took Etzel to the hospital, where he was pronounced dead.

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1. The facts contained in this section are taken from the appellate court's decision and supplemented with additional facts from the record.

In accordance with standard procedure, Etzel's death was initially declared to be from sudden infant death syndrome ("SIDS") because there were no obvious signs of trauma. After an autopsy was completed, however, the coroner concluded that the cause of death was not SIDS, but rather shaken baby syndrome.

On December 5, 1996, a social worker, Linda Reusser, went to the Townsend apartment and told Tomeka and Petitioner that the cause of death had been determined to be shaken baby syndrome. Reusser then asked what had happened on the night Etzel died. Petitioner told her that Etzel's brother had awakened about 3:20 a.m. and that Petitioner had gone to comfort him. She later went over to the sofa and saw that Etzel was face down. She touched him and he did not respond. Worried, she picked him up and gave him "a little shake, a jostle" to awaken him. Petitioner demonstrated for Reusser described as "a quick jostle," which was a smooth, rather than a jerky motion. Petitioner told Reusser that Etzel's head flopped back when she picked him up and he did not respond to her calls. At that point, Petitioner stopped talking.

Reusser asked Petitioner, "What happened next?" And Petitioner said, "Oh, my God. Did I do it? Did I do it? Oh, my God." Reusser then told Tomeka that she was going to remove her other two children from the home while authorities conducted an investigation into Etzel's death.

Los Angeles police officers interviewed Petitioner on December 9, 1996. In the interview, Petitioner told the officers that Etzel was fine when she went to sleep on the night of November 29. She explained that, early the next morning, one of Tomeka's other sons fell onto Petitioner, waking her. Petitioner then noticed that Etzel needed to have his diaper changed. When Petitioner picked him up, his head flopped back and she noticed he had vomit around his mouth. Petitioner at first told police she shook Etzel ("just a matter of a few seconds"). Petitioner then corrected herself and said that she had twisted him to try to elicit a response.

Tomeka was also interviewed by police. She told them that Petitioner had told her that during the night Etzel had fallen from the couch (a distance of 18 inches) to the carpeted floor, but had been fine, and so Petitioner had put him back to sleep on the couch.

At trial, in addition to the facts outlined above, the prosecution called two doctors who worked at the coroner's office, both of whom worked on Etzel's autopsy and concluded he had died from shaken baby syndrome. Defendant produced two doctors, one of whom opined Etzel had died from SIDS and another who concluded there was insufficient evidence to determine exactly what caused Etzel's death. In its rebuttal case, the prosecution called a third doctor who also concluded Etzel had died from being shaken.

III.

STANDARD OF REVIEW

The standard of review in this case is set forth in 28 U.S.C. § 2254:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2554(d).

Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decided a case differently that the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct f governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. *Id.* at 413. To merit relief under this clause, the state court decision must be objectively unreasonable, not just incorrect or erroneous. *Id.* at 409-10, 412.[2/]

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2. The claims raised in the instant Petition were raised before the California Supreme Court, but that court did not issue a written opinion. Nevertheless, "[w]here there has been one reasoned state judgment rejecting a federal claim, [federal courts are to presume]

IV.
DISCUSSION

A. Sufficiency of the Evidence; Assault on a Child

In Ground One, Petitioner challenges the sufficiency of the evidence to convict her of committing assault on a child causing death. (Petition at 6-7.) This claim is without merit.

Due process prohibits a person from being convicted of a crime unless he has been found guilty of every fact necessary to establish the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 365 (1970); *Spivey v. Rocha*, 194 F.3d 971, 977 (9th Cir. 1999). The United States Supreme Court established in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), that federal habeas corpus relief is not available to a petitioner who claims that the evidence was insufficient to support her conviction unless she can show that, considering the trial record in a light most favorable to the prosecution, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." This Court must presume, even if it does not affirmatively appear in the record, that the jury resolved any conflicting inferences in favor of the prosecution. *Wright v. West*, 505 U.S. 277, 296-97 (1992); *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000).

Petitioner claims that the medical injuries sustained by Etzel were not consistent with shaken baby syndrome and, therefore, the evidence presented a trial was insufficient to support her conviction. (Petition at 6(1)-6(6); Supp. P&A at 21-43.) Specifically, Petitioner contends that, because there was no evidence of retinal hemorrhaging or significant external injuries, there was insufficient proof that Etzel died from shaken baby syndrome. (Supp. P&A at 21-43.)

> Under California Penal Code § 273ab:
> Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great

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later unexplained orders upholding that judgment or rejection the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Thus, this Court will consider the reasoning of the California Court of Appeal, which addressed Petitioner's contentions in a written decision, to determine whether the California Supreme Court's decision is contrary to, or an unreasonable application of, federal law.

> bodily injury, resulting in a the child's death . . . [is guilty of assault].

Cal. Pen. Code § 273ab.

There is no dispute that Petitioner was the only adult and the only one awake in the room with Etzel the night he died. There is also no dispute that she picked up Etzel and at the very least shook him to try to rouse him when he appeared to be unconscious. Further, three medical experts testified that Etzel died of shaken baby syndrome. Finally, in at least one interview with authorities after Etzel's death, Petitioner made statements that could be interpreted as admissions of guilt, *i.e.*, "Did I do it?" This is sufficient evidence to convict Petitioner under § 273ab.

In her briefs to this Court, Petitioner cites numerous medical articles and studies which indicate that detectable physical injuries, such as retinal hemorrhaging, bruises, broken bones, and neck trauma, usually accompany a case of shaken baby syndrome. She argues that the government's expert witnesses were not as qualified as Petitioner's. She contends that the Court should reject the opinions of the government's experts and adopt the views expressed by her own. But it is not for this Court in a habeas proceeding to re-examine the medical evidence and determine which evidence the jury should have accepted and which it should have rejected. Nor is it this Court's place to conduct a *de novo* review of the medical literature and decide what that evidence means to the Court. The jury was presented with the medical evidence–both the evidence from the prosecution's three doctors that Etzel died from being shaken and the evidence from Petitioner's two doctors that the evidence did not establish that Etzel died from being shaken. The jury, apparently, accepted the testimony of the prosecution's experts and rejected the testimony of Petitioner's. This Court is not a liberty to substitute its judgment in place of the jury's based on Petitioner's argument that her version of what happened should have been accepted by the jury. The Court also rejects Petitioner's arguments that the jury should have interpreted the evidence differently or that the medical evidence and literature support a different result.

In rejecting Petitioner's arguments that the evidence was insufficient, however, the Court is not suggesting that it does not recognize what a tragedy this case is. First and foremost, a seven-week old baby was taken from this world without ever having a chance to enjoy the life that he was given. Second, his grandmother now sits in

prison serving a 15-years-to-life sentence for causing his death. The evidence in this case, though clearly sufficient to support a conviction, raises many questions. This is not the typical shaken baby case. Grandmothers, especially those not serving as the primary caretakers, are not the typical perpetrators. Further, Petitioner was helping her daughter raise her other children (a 2-year-old and a 14-month-old) and there was no hint of Petitioner abusing or neglecting these other children, who were in the room with Etzel when he died. Still further, there was no evidence of any precipitating event that might have caused Petitioner to snap and assault her grandson. She was not trapped in a hopeless situation with a child she did not want or love. Nor was she forced to single-handedly care for a baby that had been crying all day and all night. In fact, there is no evidence that Etzel was doing anything other than sleeping the night he died. In addition, Petitioner's daughter, Etzel's mother, was in the room next door when Etzel died. The medical evidence was not typical either, in that some of the telltale signs usually found in shaken baby cases did not exist in this case. It was for these reasons that the Court appointed counsel in this case. Yet, despite the commendable effort of counsel, the Court is left with the firm conviction that, under the law governing habeas corpus, Petitioner's conviction is not contrary to the Constitution or the laws of the United States and her Petition must be denied.

B. Sufficiency of the Evidence: Care or Custody of Etzel

In Ground Two, Petitioner claims there was insufficient evidence to prove that Etzel died while in her "care and custody." (Petition at 6(7)-6(13).) The claim is equally unavailing.

Under § 273ab, assault on a child causing death requires that the defendant "have[e] the care or custody of a child" at the time of the assault. Cal. Penal Code § 273ab. The term "care or custody" however, is not defined in the statute. Petitioner argues that she did not have care or custody of Etzel on the day he died, but, instead, that Etzel was in the care and custody of his mother, Tomeka Smith, who was sleeping in the room next door.

The California Court of Appeal concluded that there was "ample evidence" that Etzel was under Petitioner's care and custody at the time of the assault. It found:

> [Petitioner] was the only adult in the living room with Etzel. She cared for him when he woke earlier in the night, and she picked him up and examined him when she noticed that he was not well. This is sufficient to satisfy the care and custody

element of the offense.

(Answer, Exh. B at 114.) This Court agrees. The evidence was undisputed that Petitioner was the only adult sleeping in the room with Etzel, that Petitioner rocked the baby back to sleep after he awoke in the middle of the night, and that Petitioner picked him up to change his diaper when she noticed Etzel stopped breathing. (RT 262-67, 377-81, 923-26.) Based on this undisputed evidence, a rational jury could have concluded beyond a reasonable doubt that Petitioner had care and custody of Etzel at the time of his death. Accordingly Petitioner is not entitled to habeas relief on this ground.

C. Fairness of the Trial

In Ground Three, Petitioner claims that the trial judge violated her right to effective assistance of counsel and a fair trial by engaging in a "pattern of disparagement" of defense counsel and defense witnesses. (Petition at 6, 6(13), 7.) Petitioner alleges the following 12 acts of impropriety by the trial judge evidenced judicial bias: (1) expressing displeasure at the length of defense counsel's opening statement; (2) correcting defense counsel as to the applicable standard of proof; (3) showing greater impatience with defense counsel than with the prosecutor; (4) refusing to hear defense counsel's arguments in support of an objection; (5) commenting to defense counsel, "I will make the rulings, not you"; (7) commenting to defense counsel, "keep your comments to yourself"; (8) commenting to defense counsel, "you had her leaving for the last 10 minutes. Would you move onto something relevant"; (9) commenting to defense counsel, "you have had her on the witness stand for an hour"; (10) refusing to hear defense counsel's argument on the admissibility of a piece of evidence, calling it "totally improper"; (11) cutting off defense questioning; and (12) bolstering the qualifications of the prosecution's expert witnesses, while simultaneously denigrating equally qualified defense experts. (Petition at 6(16)-6(33).) There is no merit to this claim.[3/]

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3. Respondent argues that this claim is procedurally defaulted by an independent and adequate state bar– namely, Petitioner's failure to object at trial. (Answer at 19-20.) In order for a claim to be procedurally defaulted for federal habeas corpus purposes, the opinion of the last state court rendering a judgment in the case must clearly and expressly state that its judgment rests on a state procedural bar. *Harris v. Reed*, 489 U.S. 255, 263 (1989). Although the California Court of Appeal did state that Petitioner had

The right to a fair trial is a basic requirement of due process and includes the right to an unbiased judge. *Haupt v. Dillard*, 17 F.3d 285, 287 (9th Cir. 1994) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). Furthermore, a judge should endeavor to "avoid even the appearance of advocacy or partiality." *United States v. Harris*, 501 F.2d 1, 10 (9th Cir. 1974). A judge is, however, "more than a moderator or umpire" and may properly "participate in the examination of witnesses for the purpose of clarifying the evidence, confining counsel to evidentiary rulings, controlling the orderly presentation of the evidence, and preventing undue repetition of testimony." *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986). A defendant will be denied a fair trial "only if the record discloses actual bias on the part of the trial judge or leaves the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality." *Id.* (internal quotation marks omitted). The question a court must ask on habeas review is "whether the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995).

Here, Petitioner does not suggest and the record does not reflect that the trial judge was actually biased against her and her counsel. Rather, Petitioner contends that the trial judge's disparaging remarks and actions toward defense counsel gave the appearance of partiality, thereby undermining Petitioner's defense. The California Court of Appeal examined each of the 12 alleged acts of impropriety by the trial judge and found no error. (Answer, Exh. B at 114-24.) Although the appellate court noted that a few of the trial judge's remarks expressed "impatience" with counsel and, more properly, should have been done

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waived any trial court misconduct claims to which he failed to object, the state appellate court merely noted that Petitioner objected "in some instances, but not in all." (Answer, Exh. B at 114.) The California Court of Appeal did not clarify in which instances Petitioner made a sufficient objection to preserve the issue for appellate review and in which instances the claim had been waived. (Answer, Exh. B at 114.) Under these circumstances, this Court does not find the appellate court's order to be sufficiently clear to warrant a procedural default. *See Valerio v. Crawford*, 306 F.3d 742, 773 (9th Cir. 2002) (holding a procedural default based on an ambiguous order is not sufficient to preclude federal collateral review), *cert. denied sub nom. McDaniel v. Espiredion Valerio*, 123 S. Ct. 1788 (2003).

at sidebar, it concluded that the rulings themselves were legally correct and sell within the trial judge's rightful discretion to control the proceedings. (Answer, Exh. B at 114-24.)

This Court agrees. Several of the trial judge's alleged improprieties were appropriate instances of judicial intervention, necessary to maintain the orderliness of the proceedings. For example, when defense counsel interrupted the judge prior to the court's ruling on a defense objection, the judge properly admonished defense counsel: "I will make the rulings, not you." (RT 811.) Similar acts by the trial judge do not suggest judicial bias or partiality but rather demonstrate the judge's proper control over the proceedings. *See Mostella*, 802 F.2d at 361.

Petitioner also argues that the trial judge's rulings on the admissibility of certain evidence indicate judicial bias. "Judicial rulings alone[, however,] almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Here, Petitioner has not demonstrated that any of the trial judge's rulings were incorrect, let alone indicative of bias.

Similarly, this Court cannot conclude that any disparate treatment of the expert witnesses by the trial judge amounted to a due process violation. For example, after defense counsel was allowed to voir dire Dr. Eugene Carpenter, one of the prosecution's expert witnesses, regarding his qualifications as an expert on shaken baby syndrome, the trial judge commented, "He is certainly qualified as his training." (RT 547-49.) During it rebuttal case, the prosecution proffered another expert witness on shaken baby syndrome, Dr. David Chadwick. After defense counsel was given extensive opportunity to conduct voir fire on Dr. Chadwick, the trial judge allowed him to testify, stating, "He is well qualified." (RT 1433-38.)

When the prosecutor objected to the qualifications of defense expert Dr. William Goldie, the trial judge stated that his "qualifications . . . [went] to the weight of his testimony." (RT 971.) This comment was not disparaging, but simply informed the jury that Dr. Goldie's experience should be considered in deciding what weight his testimony should carry. After further objection from the prosecutor, the trial judge conducted its own voir dire and subsequently allowed Dr. Goldie to testify as an expert. (RT 971-73.)

In sum, the trial judge's comments about the experts were not improper and did not unfairly prejudice Petitioner.[4/] Petitioner's argument to the contrary is rejected.

Finally, the Court notes that the trial judge at times expressed her dissatisfaction with defense counsel regarding the pace of the proceedings. Some of the comments directed toward counsel may have been more appropriately made outside the presence of the jury. Nevertheless, considering the fact that the trial lasted nearly three weeks, this Court is not left with an abiding impression that these isolated comments by the trial judge gave an appearance of advocacy partiality.[5/] Furthermore, any possible taint caused by the trial judge's comments was overcome by her admonition to the jurors at the close of the trial that they form their own conclusions regarding the evidence, the witnesses, and the guilt of the defendant.[6/] Having reviewed the trial record, the Court finds that the trial judge's comments to Petitioner's counsel did not render Petitioner's trial so fundamentally unfair as to violate due process. *See Duckett*, 67 F.3d at 740. Accordingly, as to this claim, Petitioner is not entitled to habeas relief.

---

4. At the conclusion of the trial, outside the jury's presence, the trial judge told Petitioner and her defense counsel that, although he felt Dr. Goldie was not a helpful witness, Dr. Richard Seigler, a second defense expert witness, "was very impressive." (RT 1649.)

5. Opening statements were given on November 12, 1997, and closing arguments were given on December 3, 1997. (CT 390, 419.)

6. The jury was instructed as follows:

> I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness.
>
> If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion.

(CT 468.)

D. Cumulative Error

Finally, Petitioner claims that the cumulative effect of the errors in Grounds One, Two, and Three deprived her of due process of law and a fair trial. (Petition at 7.) The cumulative effect of multiple trial errors may prejudice a defendant to the extent that his conviction must be overturned; however, where there is no single constitutional error, as here, "there is nothing to accumulate to a level of a constitutional violation." *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002); *see also Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) (finding the "collective presence" of "several substantial errors" was prejudicial), *cert. denied*, 537 U.S. 1179 (2003). Because Petitioner has not demonstrated constitutional or substantial error in any of her individual claims, her cumulative error claim fails as well. Accordingly, Petitioner is not entitled to habeas relief.

V.

RECOMMENDATION

For the foregoing reasons, the California courts' denial of Petitioner's claims was neither contrary to nor an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. (d)(1). Accordingly, IT IS RECOMMENDED that the District Court issue an Order (1) accepting and adopting this Report and Recommendation and (2) directing that judgment be entered dismissing the Petitioner with prejudice.

DATED: March 22, 2004.

s/_____
PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

APPENDIX - D

FILED
CLERK, U.S. DISTRICT COURT
APRIL 13, 2004
CENTRAL DISTRICT OF CALIFORNIA
BY s/_____ DEPUTY

DOCKETED ON CM
APRIL 14, 2004
BY s/_____ 022

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHIRLEY REE SMITH, Petitioner, v. GWENDOLYN MITCHELL, WARDEN, Respondent.	CASE NO. CV 01-4484-ABC (PJW) ORDER ACCEPTING REPORT AND ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the records on file, and the Report and Recommendation of United States Magistrate Judge and has considered *de novo* the portions of the Report as to which objections have been filed. The Court accepts the Magistrate Judge's Report and adopts it as its own findings and conclusions.

DATED: April 12, 2004.

s/_____
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

APPENDIX - E

FILED
CLERK, U.S. DISTRICT COURT
APRIL 13, 2004
CENTRAL DISTRICT OF
CALIFORNIA

BY s/_____ DEPUTY

ENTERED
CLERK, U.S. DISTRICT
COURT
APRIL 14, 2004
CENTRAL DISTRICT OF
CALIFORNIA
BY s/_____DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHIRLEY REE SMITH,	) Case No.
	) CV 01-4484-ABC (PJW)
Petitioner,	)
	) J U D G M E N T
v.	)
	)
GWENDOLYN MITCHELL, WARDEN,	)
	)
Respondent.	)
	)

Pursuant to the Order Adopting Findings, Conclusions, and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: April 12, 2004.

s/_____
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

APPENDIX - F

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY REE SMITH, *Petitioner-Appellant,* v. GWENDOLYN MITCHELL, Warden, *Respondent-Appellee.*	No. 04-55831 D.C. No. CV-01-04484-ABC OPINION

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted
February 8, 2005—Pasadena, California

Filed February 9, 2006

Before: Harry Pregerson and William C. Canby, Jr.,
Circuit Judges, and Edward C. Reed, Jr.,* District Judge.

Opinion by Judge Canby

*The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

PUBLISHERS NOTE

PAGE 1536 MISSING IN ORIGINAL DOCUMENT

COUNSEL

Michael J. Brennan, Manhattan Beach, California, for the petitioner-appellant.

Richard T. Breen, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

Shirley Ree Smith appeals the district court's denial of her habeas corpus petition. The State of California convicted Smith of assault on a child resulting in death. The state courts affirmed her conviction. Smith then filed this federal habeas petition claiming that her conviction violated due process

because the evidence was constitutionally insufficient. On appeal, Smith focuses her argument almost exclusively on the absence of constitutionally sufficient evidence of one element of the crime—the cause of the child's death. We agree with Smith that no rational trier of fact could have found beyond a reasonable doubt that Smith caused the child's death. We further conclude that the state court's affirmance of Smith's conviction constituted an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), which established the standard for constitutional sufficiency of the evidence. *See* 28 U.S.C. § 2254(d)(1). We accordingly reverse and remand with instructions to grant the writ.

I

Smith is the grandmother of the deceased infant, Etzel. Smith's daughter Tomeka Smith is the mother of the child. Tomeka also had two older children, Yondale and Yolanda. Prior to Etzel's birth, the entire family lived in Illinois. In July 1996, Smith moved to California and brought her two grandchildren, Yondale and Yolanda, with her. On October 8, 1996, Tomeka moved to California, where she joined Smith, Yondale, and Yolanda. Two days later, Tomeka gave birth to Etzel.

Tomeka delivered him two weeks early, and he weighed five pounds, four ounces. He was born with jaundice and a slight heart murmur. The murmur disappeared, however, three days after it was diagnosed. The jaundice gradually disappeared, too. Etzel became a healthy baby and showed no signs of child abuse.

Smith, Tomeka, Yondale, Yolanda and Etzel usually stayed with Stephen Keys, Smith's brother. Occasionally, however, they stayed with Renee Townsend, Smith's sister, at Townsend's apartment. Townsend's two children, Marcus and Marcellus lived there as well. When Tomeka and her children stayed at Townsend's apartment, Smith would accompany

them to assist Tomeka in taking care of the children. Smith was described as always giving loving care to her grandchildren, and no one had ever seen her act harshly or abusively toward them.

On the night of Etzel's death, the group stayed at Townsend's. Tomeka testified at length about the events of that evening, from her own observations and from what Smith told her as the emergency unfolded and thereafter.[1] The facts as Tomeka related them were not complicated. Etzel, who was approximately seven weeks old at the time, appeared perfectly healthy during the day and at the beginning of the evening. Both Tomeka and Smith fed him.

That night, Tomeka fed, changed, and washed Etzel before rocking him to sleep and laying him on the couch in the living room, placing him on his stomach, with his face to the side. Yondale also slept on the couch. Yolanda slept on the love seat.[2] Marcus and Marcellus slept in their bedroom.[3] Smith slept on the floor, next to the love seat on which Yolanda slept.

Townsend left the apartment at roughly the same time that Tomeka placed Etzel on the couch. Tomeka remained in the living room for another hour or so. During this time, she checked Etzel's diaper while he slept, and she saw that he moved his body at that time. She also moved Etzel back on the couch pillow because his feet started to fall off of it. She then went into Townsend's room to listen to music.

Though Tomeka usually slept in the living room with

[1]Smith herself testified very briefly, denying that she had shaken Etzel on the night of his death. She was subjected to almost no cross-examination, and her entire testimony extends for less than three pages of transcript.

[2]Yondale was approximately fourteen-months old, and Yolanda was approximately four-years old.

[3]They were seven- and ten-years old, respectively.

Smith and the children, that night she fell asleep in Townsend's room while listening to music. She left the door to Townsend's room open, at least partially. Tomeka testified that she fell asleep around midnight. She also stated that it was the first night that she slept in a different room from Etzel. At approximately 1:30 a.m., Smith awoke and found Etzel on the floor. She picked him up, rocked him back to sleep, and placed him on the couch in the same position (stomach down, head to the side). She did not notice anything unusual about him.

At 3:20 a.m., Smith awoke again because she had to go to the bathroom. After she returned from the bathroom, she looked at Etzel and saw that he had thrown up and had blood on his right nostril. He did not respond to her touch. She picked him up and his head "flopped back." She moved him back and forth, but he did not respond.[4] She then went into Townsend's room carrying Etzel. She woke Tomeka and told her what had happened. Tomeka dialed 911. Over the phone, Tomeka and Smith were instructed to give Etzel CPR, which they did.

When firefighters and paramedics arrived, Smith was "apprehensive" and stated that she thought Etzel had fallen off the couch. Etzel was clothed and warm, but he was not breathing and had no heartbeat. The paramedics began CPR. Three of the rescue squad noticed blood in one of Etzel's nostrils, and one consequently thought Etzel had suffered an injury. When an ambulance arrived, two more technicians administered CPR on the way to the hospital. Etzel appeared "chalky." They arrived at the hospital at 3:50 a.m. Etzel was

[4]Smith demonstrated this "jostle" to a social worker, who testified at trial. The social worker stated that Smith demonstrated picking up the baby under his arms and moving him quickly forward and back in a smooth motion. Smith later told police that she had given him a little shake, but then she corrected herself, saying she had "twisted" him slowly from side to side.

in full cardiac arrest. The attending physician pronounced him dead and suspected he died of Sudden Infant Death Syndrome ("SIDS"), a death with no known cause.

It was the theory of the prosecution, however, that this recitation of facts left out one crucial occurrence: Smith must have shaken Etzel so violently that it caused his death. The evidence offered in support of this theory was the autopsy and the controverted expert testimony, based on that autopsy, that Etzel died of Shaken Baby Syndrome.[5] The physical evidence, however, was not typical of that usually associated with Shaken Baby Syndrome.

Associate Deputy Medical Examiner Dr. Stephanie Erlich performed the autopsy on Etzel.[6] She testified, as did her supervisor, Dr. Eugene Carpenter, who participated in parts of the autopsy.[7] They found recent subdural and subarachnoid hemorrhages (i.e., bleeding on the brain) There was also evidence of old subdural bleeding, and both old and new bleeding around the optic nerves. There was in addition a recent small abrasion, approximately 1/16 by 3/16 of an inch, on the lower skull, upper neck region, and a recent bruise beneath this abrasion. Etzel's heart was normal.

All of the expert testimony offered by both sides agreed that the amount of recent bleeding (approximately one or two tablespoons) was not sufficient to have caused death, nor was the small abrasion sufficient for that purpose. To the prosecution experts, however, the presence of blood supported the

[5]Shaken Baby Syndrome is also known as Shaken Infant Syndrome or SIS. We use the Shaken Baby terminology to avoid confusion with Sudden Infant Death Syndrome or SIDS.

[6]This was Dr. Erlich's first autopsy in a child abuse case. She was assigned the autopsy because Etzel was originally believed to be the victim of Sudden Infant Death Syndrome.

[7]Dr. Carpenter was a Medical Examiner and forensic pathologist for the Los Angeles County Coroner. He had performed 3,000 to 4,000 autopsies.

diagnosis of Shaken Baby Syndrome.[8] There was no dispute, however, that the usual Shaken Baby Syndrome death occurs from massive bleeding or swelling of brain tissue that creates such crushing pressure against the brain stem that vital processes are interrupted and the baby dies. It was also agreed that in 80% or more of the cases of Shaken Baby Syndrome, there is bleeding in the retinas of the eyes. There are also frequently fractures in the arms or similar evidences of violence.

There was no swelling, and only a small, non-fatal amount of bleeding, in Etzel's case. Etzel had no retinal bleeding, and no fractures or large bodily bruises common in cases of shaking. The scalp abrasion was minimal, and was not even discovered until well into the autopsy.

The prosecution experts testified, however, that shaking caused the death even though the physical examination of the brain during and after autopsy could not demonstrate that fact. The experts testified that the shaking must have been so violent and severe that it directly tore or sheared parts of the brain stem, causing immediate cessation of vital activity such as breathing. This tear in the brain stem would not have been apparent in autopsy, according to the prosecution experts, because instantaneous death would have prevented any bleeding or swelling. No microscopic examination of the brainstem was performed following the autopsy because, as Dr. Erlich testified, "[W]e wouldn't have seen anything anyway." The fatal tear or shearing would not have been detectable. Dr. Ehrlich could not identify any source in the literature for her hypothesis of undetectable brain stem shearing, but said she had learned it from lectures and consultations.

With regard to this undetectable cause of death, defense

[8]In addition to Drs. Ehrlich and Carpenter, Dr. David Chadwick, a pediatrician specializing in abuse, also testified for the prosecution. His testimony was briefer than, but generally paralleled, that of Drs. Ehrlich and Carpenter.

expert Dr. Richard Siegler, said that the hypothesis was "fantasy." When pressed by the prosecutor to elaborate, he said: "[W]hat you have said is possible, but it is also not possible and that's what we call fantasy. . . . There is no way to confirm it or deny it." Dr. Siegler stated that he had not previously heard or read of the hypothesis of undetectable brain stem injury in a Shaken Baby death.[9] Dr. Seigler opined that Etzel died from the lingering effects of earlier brain trauma of unknown but quite possibly innocent cause, and that his death was inconsistent with Shaken Baby Syndrome.

The defense also presented Dr. William Goldie, who examined the records and testified that Etzel likely died of SIDS. Dr. Goldie, like Dr. Siegler, did not believe that Shaken Baby Syndrome could occur without massive brain swelling or bleeding, at least not when the brain stem appeared undamaged, as Etzel's did. He noted that prematurely born infants sometimes bleed into the head without cause. Dr. Goldie testified that SIDS was the leading cause of deaths in infants from one to five months of age, while Shaken Baby Syndrome deaths occur predominantly in ages four to nine months.

Dr. Goldie described some of the characteristics that led him to conclude that Etzel died of Sudden Infant Death Syndrome. With SIDS, the infant usually would appear normal, but then he or she suddenly would die. SIDS occurred more frequently in babies who, like Etzel, were small for their age, who had mothers who had multiple children already or smoked or used drugs, and, most importantly, who had been placed face-down on their stomachs. Males were more likely victims than females. He also concluded that Etzel's problems —jaundice, heart murmur, and low birth weight—made him more likely to die from SIDS, as did a background of poverty.

[9]Dr. Siegler was a pathologist of many years experience associated with the University of Southern California, and formerly with Harvard and U.C.L.A. He had done 5,000 to 8,000 autopsies, about 50 of which were infants.

II

On this evidence, a jury of the Superior Court of Los Angeles County convicted Smith of assault on a child causing death, in violation of section 273ab of the California Penal Code.[10] The trial judge sentenced her to fifteen years to life in prison. Smith appealed, challenging the sufficiency of the evidence. The California Court of Appeal affirmed in an unpublished opinion, and the Supreme Court of California denied review.

Smith filed a petition for habeas corpus in the Central District of California. A magistrate judge recommended dismissal, and the district court dismissed the petition. The court, however, granted a certificate of appealability on the question "[w]hether there was sufficient evidence to convict [Smith] of committing assault on a child in her care or custody causing death."

III

We review de novo the district court's denial of a habeas petition. *See Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). We approach this case with a firm awareness of the very strict limits that the Antiterrorism and Effective Death Penalty Act ("AEDPA") places on our collateral review of state criminal convictions. *See Juan H. v. Allen*, 408 F.3d 1262, 1269-70 (9th Cir. 2005), *cert. denied*, 2006 WL 88993, 88994 (U.S. Jan. 17, 2006). We cannot grant relief unless the decision of the California Court of Appeal was "contrary to,

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[10]Section 273ab provides the following:

> Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for [fifteen] years to life.

CAL. PENAL CODE § 273ab.

or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The constitutional standard for sufficiency of the evidence established by the Supreme Court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 319. Our task under AEDPA, then, is to determine whether the decision of the California Court of Appeal, holding that the evidence was sufficient to convict Smith, was an unreasonable application of *Jackson*. *See* 28 U.S.C. § 2254(d); *see also Juan H. v. Allen*, 408 F.3d at 1274-75 & nn. 12-13 (establishing that AEDPA requires a layer of deference to a state court decision in addition to that specified by *Jackson*). In this most unusual case, we conclude that the Court of Appeal unreasonably applied *Jackson*.

IV

[1] The troubling state of the evidence in this case was perhaps best described by Magistrate Judge Patrick J. Walsh. Even though, contrary to our view, he believed the strict requirements of AEDPA for habeas relief had not been met, Judge Walsh stated:

> This is not the typical shaken baby case. Grandmothers, especially those not serving as the primary caretakers, are not the typical perpetrators. Further, Petitioner was helping her daughter raise her other children (a 2-year-old and a 14-month-old) and there was no hint of Petitioner abusing or neglecting these other children, who were in the room with Etzel when he died. Still further, there was no evidence of any precipitating event that might have caused Petitioner to snap and assault her grandson. She was not

> trapped in a hopeless situation with a child she did not want or love. Nor was she forced to single-handedly care for a baby that had been crying all day and all night. In fact, there is no evidence that Etzel was doing anything other than sleeping the night that he died. The medical evidence was not typical either, in that some of the telltale signs usually found in shaken baby cases did not exist in this case.

Nothing significant in the background suggests guilt, therefore, and many factors suggest innocence.[11] Indeed, not only was there no evidence of any "precipitating event that might have caused [Smith] to snap," but it is extremely unlikely that even a very troublesome act by seven-week-old Etzel would cause Smith to shake Etzel to death when his mother lay but a few feet away and easily available. A constitutionally permissible finding of guilt in this case therefore depends on the expert evidence of the cause of death.

[2] There is no question that the prosecution experts testified that a shaking had caused the death, but they conceded the absence of the usual indicators of violent shaking such as bruises on the body, fractured arms or ribs, or retinal bleeding. There was bleeding on the brain, both old and new, but not enough to cause death. All of the prosecution witnesses based their opinion of Shaken Baby Syndrome on their hypothesis that violent shaking had torn or sheared the brain stem in an undetectable way. Their testimony was not that the brain demonstrated death in the usual manner of Shaken Baby Syndrome, caused by excessive bleeding or swelling that crushes the brain stem. Instead, their testimony was that death was caused by shearing or tearing of the brain stem and they

[11]A social worker, who visited Smith and Tomeka and expressed the view that Etzel had died of shaking, testified that Smith said "Oh, my God. Did I do it?" A rational trier of fact, however, could not convict on this distraught and equivocal statement in the absence of credible expert testimony as to the cause of death.

reached this conclusion because *there was no evidence in the brain itself of the cause of death*. Thus, as the defense expert Dr. Siegler stated, the tearing might have occurred or it might not have occurred; there simply was no evidence to permit an expert conclusion one way or the other on the point. This is simply not the stuff from which guilt beyond a reasonable doubt can be established, especially in the face of all the other circumstances, many of which were recited by the magistrate judge, making the crime unlikely. An expert's testimony as to a theoretical conclusion or inference does not rescue a case that suffers from an underlying insufficiency of evidence to convict beyond a reasonable doubt. *See United States v. Boissoneault*, 926 F.2d 230, 234 (2d Cir. 1991).

V

[3] The prosecution's expert testimony, absolutely critical to its case, concluded that the cause of death was tearing or shearing of the brain stem when there was no physical evidence of such tearing or shearing, and no other evidence supporting death by violent shaking. Absence of evidence cannot constitute proof beyond a reasonable doubt.

[4] The California Court of Appeal, in affirming Smith's conviction, described the expert testimony but did not address the problem presented by the lack of evidence, from the autopsy or ensuing tests, that the brain stem had been sheared. It affirmed with a statement that the experts conflicted and resolution of the conflict was for the jury. With all due respect to the California Court of Appeal, and even with the additional layer of deference mandated by AEDPA, we conclude that the Court of Appeal unreasonably applied *Jackson* when it held the evidence to be sufficient to convict Smith of causing Etzel's death. There was simply no demonstrable support for shaking as the cause of death. As a result of the unreasonable application of *Jackson*, there has very likely been a miscarriage of justice in this case.

We reverse the judgment of the district court and remand with instructions to grant the writ.

REVERSED; REMANDED with instructions.

APPENDIX - G

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY REE SMITH, *Petitioner-Appellant,* v. GWENDOLYN MITCHELL, Warden, *Respondent-Appellee.*	No. 04-55831 D.C. No. CV-01-04484-ABC ORDER

Filed July 14, 2006

Before: Harry Pregerson and William C. Canby, Jr., Circuit Judges, and Edward C. Reed,* District Judge.

Order;
Dissent by Judge Bea

ORDER

The panel voted to deny the petition for panel rehearing. Judge Pregerson has voted to deny the petition for rehearing en banc, and Judges Canby and Reed have so recommended.

The petition for en banc rehearing has been circulated to the full court. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

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*The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

BEA, Circuit Judge, with whom KLEINFELD, GRABER, TALLMAN, and CALLAHAN, Circuit Judges, join, dissenting from denial of rehearing en banc:

I write to make clear our court has, by its decision in this case, made a substantial departure from settled principles of review of jury determinations of fact in criminal cases.

In this case, our court decides the opinions of three Board-certified physicians called by the prosecution that Smith's shaking of baby Etzel caused his death must be substituted with the contrary opinions of non-Board-certified physicians called by the defense. Why? Because the defense's doctors testified that a finding was absent on autopsy, and that finding was crucial and undermined the prosecution experts' testimony. The three physicians called by the prosecution disagreed with the defense doctors, and explained why such a finding was not crucial. Our court simply accepts the defense theory and rejects the prosecution's evidence. The jury was perfectly able to do just that. But when our court does it, it steps over the line dividing the province of the jury from that of the court.

This decision would be bad enough were we reviewing a district court's judgment. But here, it is doubly bad for we are reviewing a state court decision under the Antiterrorism and Effective Death Penalty Act ("AEDPA")[1] which severely restricts the scope of our review, and mandates that "we apply the standards of *Jackson* with an additional layer of deference." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005), *cert. den.*, 126 S. Ct. 1142 (2006).

[1]Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2241 *et seq.*

I

In 1997, Shirley Ree Smith was convicted by a California jury of the unlawful killing of her seven-week-old grandson, Etzel Glass ("Etzel"). On the night of Etzel's death, Smith was staying with her daughter Tomeka, the infant's mother, along with her two other young grandchildren and two of Tomeka's sister's children. Around midnight, Tomeka fed, changed, and washed baby Etzel before placing him to sleep on the living room sofa. Baby Etzel shared this sofa with his 18-month-old brother, Yondale, and four-year-old sister, Yolanda. Smith was also in the living room, sleeping on the floor. When Tomeka put Etzel to sleep at 11:30 p.m., he appeared healthy.

In her two interviews, Smith recounted different versions of the events that followed. First, Smith told a social worker, Linda Reusser, that she awoke after 3 a.m. when Etzel's brother Yondale had a nightmare. After comforting Yondale, Smith went over to check Etzel. Etzel didn't respond to her touch; she picked Etzel up and his head "flopped back." She then gave Etzel "a little shake, a jostle to awaken him," to which Etzel did not respond. Reusser described the shaking to the jury as "a quick jostle," a "smooth motion."

At this point, Smith stopped speaking. When Reusser prompted Smith to continue, she said "something like 'Oh, my God. Did I do it? Did I do it? Oh, my God.' " Smith's daughter Tomeka turned to Smith and said: "If it wasn't for you, this wouldn't have happened." Smith didn't say anything.

Smith told a slightly different story to the police who interviewed her as part of the criminal investigation. Smith stated that Yondale awoke from his nightmare sometime before 3 a.m.; Smith rose and checked Etzel; Etzel was fine. Then, past 3 a.m., Etzel's sister Yolanda rolled off the couch and fell onto Smith. On waking, Smith noticed that Etzel's diaper

needed changing. After going to the bathroom to take her medicine, Smith picked up Etzel and saw he had "spit up" around his mouth, and his head was "flopped back." Smith said something to Etzel and he didn't respond; he was not breathing or moving. At first, Smith told the police she "shook" Etzel, but then corrected herself, and said she "twisted" him back and forth to get a response. When asked about her statement to Reusser, Smith denied saying that she had "shaken" Etzel.

Smith then carried Etzel, who was not responsive, into Tomeka's room. Smith and Tomeka called 9-1-1. After unsuccessful attempts at cardio-pulmonary resuscitation ("CPR") by the family and the paramedics, Etzel was taken to the hospital. Soon after his arrival, he was declared dead. The physician attending at the hospital suspected Etzel had died of Sudden Infant Death Syndrome ("S.I.D.S."), which, as one defense expert put it, is "a medical[ly] sophisticated way of saying the child died and we really don't have any idea what it died from." The only injury the paramedics noticed was fresh blood in one of Etzel's nostrils. In such cases, the doctor lists "suspected S.I.D.S." as the cause of death, pending an autopsy.

But here, the autopsy revealed signs of recent trauma to Etzel's brain. When the autopsy surgeon lifted Etzel's brain out of the skull, she saw fresh blood on top of the brain ("subdural"[2] blood). The subdural blood measured one or two tablespoons. The surgeon also saw a fresh blood clot between the hemispheres of Etzel's brain, and recent hemorrhaging around the optic nerves. Further, she found a small quantity of fresh "subarachnoid" blood. Finally, the surgeon and her supervisor noticed a small bruise at the left lower-back part of Etzel's head, and a recent abrasion at the same site.

[2]As an expert testified below, the brain is protected by three sheaths or membranes: the dura, the arachnoid, and the pia. Blood found between the dura and the arachnoid is referred to as "subdural." Blood between the arachnoid and the pia is referred to as "subarachnoid."

Dr. Carpenter, the autopsy supervisor, opined Etzel had died by being violently shaken ("shaken baby syndrome").[3] According to Carpenter, death from violent shaking can occur in three ways: (1) massive swelling of the brain; (2) massive bleeding sufficient to crush the brain stem; or (3) a sudden shaking "so violent that it destroys the vital centers in the brain and is a quick death." Here, Carpenter opined that death occurred through the last process, as Etzel's head had undergone whiplash from chin to chest. The death occurred too quickly for visible trauma to develop on the brain stem itself.

Dr. Carpenter explained the basis of his opinion as the recent trauma to Etzel's brain and the absence of other causes. The subdural blood, the subarachnoid blood, and the blood around the optic nerves showed "violent trauma to the head sufficient to cause the death of the infant." The bruise and abrasion had, in Carpenter's opinion, "very probably" occurred during the shaking episode, as the head collided with a hard, rough surface.[4]

The alternate causes of death that Carpenter considered didn't make sense to him. First, Carpenter ruled out S.I.D.S. because "[a case] is never called a S.I.D.S. if there is any suspicion of trauma to the infant." Second, Carpenter ruled out that a fall from the sofa onto a carpeted floor could have caused Etzel's injuries or death. Third, Carpenter considered the evidence of an old injury to Etzel's brain, such as birth

[3]Dr. Carpenter was Board-certified in forensic, anatomic, and clinical pathology. Tr. 534-36. "Board-certified" means the physician has first practiced a certain number of years in the field of specialty which the Board regulates. To gain certification as a specialist by the Board, the physician must then take certain written tests. Last, upon successful completion of those tests, the physician must sit successfully for oral examination by a group of Board-certified specialists. Only then can the physician become "Board-certified."

[4]While Dr. Carpenter could not rule out that Etzel's head received a blow from a weapon, the bruise and abrasion were too small to indicate a blow that could have caused all of the trauma in Etzel's brain.

trauma, as the cause of death. While he could not exclude the old injury as contributing to Etzel's death, the old injury was "not sufficient to cause death in that the infant had apparently sufficiently recovered from this injury and was appearing to look normal to others."

Under *Jackson*, Dr. Carpenter's opinion alone suffices to support the jury's finding on causation. But then the prosecution called two other Board-certified doctors, who testified that violent shaking was the cause of death. Notably, the prosecution's witness on rebuttal, Dr. Chadwick, had published articles on how to distinguish between falls and abusive injuries in children. Based in part on his own research, Chadwick opined that a fall from the sofa was "extremely unlikely" to cause death. Chadwick also explained that the old trauma was not the cause of death because old injuries do not cause sudden death without a specific pathology that was absent in this case. In short, Chadwick saw "no other natural or unnatural cause except the injury that would explain [Etzel's] death," and, therefore, opined that Etzel died from shaken baby syndrome.

The defense's two expert witnesses, by contrast, opined that the necessary physical evidence of shaken baby syndrome was lacking. Dr. William Goldie opined the cause of death was S.I.D.S. Dr. Richard Siegler opined that the death was traumatic, but that it was impossible to isolate the cause of death between the recent and the old trauma. Significantly, both Goldie and Sielger would only diagnose Etzel's death as shaken baby syndrome or a finding of visible injury to the shorn region of the brain stem. Even if death were instantaneous, Goldie opined that hemorrhages in the neck or brain stem would be present. Thus, the experts for the prosecution and the defense disagreed on a fundamental point: to be valid, does a doctor's opinion that a baby died from violent shaking require evidence, visible on autopsy, of brain stem shearing?

The jury resolved this conflict among the experts' opinions against Smith. The California Court of Appeal, after review-

ing the medical evidence, affirmed the conviction because "[i]t was for the jury to resolve the conflicts" in that evidence. The California Supreme Court denied review. On federal habeas review, the Magistrate Judge recommended denying Smith's petition for the same reason as the California Court of Appeal. Notwithstanding the tragedy of Smith's case, it was the jury's province to choose between the conflicting expert opinions. The district court accepted the recommendation and denied Smith's habeas petition.

II

Our court, however, granted habeas relief on the ground of insufficient evidence of causation. *See Smith v. Mitchell*, 437 F.3d 884 (9th Cir. 2006). Claims of insufficient evidence are judged according to a familiar standard: we ask whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. AEDPA requires the federal courts to review *Jackson* claims with additional deference, and only grant habeas relief where the state court's adjudication of a *Jackson* claim is objectively unreasonable. *See Smith*, 437 F.3d at 889 (citing *Juan H.*, 408 F.3d at 1274-75 & nn.12-13).

To grant habeas relief, the opinion set aside the qualified opinions of the prosecution's experts by misconstruing the basis for their opinions. "[T]heir testimony was that death was caused by the shearing or tearing of the brain stem and"—according to the opinion—"they reached this conclusion because *there was no evidence in the brain itself of the cause of death*." *Smith*, 437 F.3d at 890.

Not so; the opinion is inaccurate.

The physicians called by the prosecution reached their conclusion *despite* the lack of visible shearing, not because of it, and explained why. Indeed, what provided the basis for the

doctors' opinions was the evidence of recent trauma to Etzel's brain: (1) the subdural hemorrhaging; (2) the subarachnoid hemorrhaging; (3) the hemorrhaging around the optic nerves; (4) the blood clot between the hemispheres of Etzel's brain; and (5) the bruise and abrasion at the lower back of Etzel's head. The prosecution's experts considered and rejected other causes of Etzel's death, such as a fall from the sofa, or the aggravation of Etzel's older injury. Since none of these alternate theories explained Etzel's death, the prosecution's doctors opined that Etzel died from violent shaking, as evidenced by the trauma.

Not once did the prosecution's doctors voice the supposed basis the opinion attributes to them. Rather their opinions were based on the evidence of the child's injuries, notwithstanding that they did not see the brain stem shearing on autopsy.

In effect, the opinion adopts the defense experts' view of what physical evidence is necessary to support a valid diagnosis of shaken baby syndrome. Specifically, the opinion relies on Dr. Siegler's aspersion of the prosecution's theory as "total fantasy," when there is "no way to confirm it or deny it" with direct physical evidence. The opinion similarly concludes "there simply was no evidence to permit an expert conclusion one way or the other," absent the physical evidence Siegler demanded. *See Smith*, 437 F.3d at 890.

But the prosecution's experts explained why they would not expect to see physical evidence of tearing in Etzel's brain stem: Etzel's death happened so quickly that the effects of the trauma did not have time to develop. That is, there was no swelling in the torn brain stem tissue because the child's instant death closed down its circulation.

The opinion buttresses its conclusion by pointing to the absence of various factors that are "typically," "usually," or "frequently" present in cases of shaken baby death. *See Smith*,

437 F.3d at 887. For instance, the opinion points to the absence of retinal bleeding, which is present in 80-85% of shaken baby cases, and almost never present otherwise. Yet Dr. Carpenter testified that the absence of retinal bleeding did not change his opinion on the cause of death. Even the defense doctor, Dr. Siegler, did not think retinal hemorrhages were necessary to diagnose shaken baby syndrome. Thus, the absence of these "usual" symptoms simply constitutes circumstantial evidence favorable to the defense, not a failure of proof as to an essential element of the prosecution's case.

Although Smith did not challenge the admissibility of the prosecution's experts' testimony, the opinion's analysis effectively makes the qualification of experts an issue on appeal.[5] Up to now, the ceaselessly litigated question of whether expert testimony is "junk science" has been channeled

[5]The overlap between the sufficiency of the evidence and qualification of experts is illustrated by the opinion's reliance on *United States v. Boissoneault*, 926 F.2d 230, 234 (2d Cir. 1991). There, the Second Circuit reversed a conviction for possession of cocaine with the intent to distribute. The defendant was found carrying 5.31 grams of cocaine; $1,460 in ten and twenty dollar bills; and many slips of paper bearing names, addresses, and telephone numbers. *Id.* at 231. The question was whether this evidence permitted the inference of intent to distribute the 5.31 grams. Over defense objection, the government called an expert who opined that the evidence was consistent with "classic street level distribution of small quantities of cocaine." *Id.* at 232. On appeal, the defendant challenged both the admission of this testimony and the sufficiency of the evidence. *Id.* at 231. The Second Circuit reversed for insufficient evidence. Without deciding the evidentiary issue, the court held that conclusory opinions that "ambiguous conduct constitutes criminal activity" do not count toward establishing the sufficiency of the evidence. *Id.* at 234.

Boissoneault is directly contrary to California Evidence Code § 805, which allows opinion testimony as to ultimate facts. Moreover, the subject of the opinion in *Boissoneault* was whether ambiguous conduct is criminal, an area where expert opinion is of little help to the trier of fact. *See United States v. Young*, 745 F.2d 733, 765-66 (2d Cir. 1984) (Newman, J., concurring). By contrast, whether autopsy results establish the cause of death is a question on which expert opinion is indispensable to the jury.

through the *Daubert*[6] and *Kelly/Frye*[7] tests governing the qualification and admissibility of expert testimony. Under our court's approach, a federal court of appeals may, effectively, set aside an expert opinion where it conflicts with the views of the other side's experts.

Here, the prosecution's experts based their opinions on the evidence of recent trauma to Etzel's brain, and explained how a rapid death would result in brain-stem tearing that could not be seen. When the defense's experts disputed the validity of this hypothesis, it was for the jury to resolve the conflicting opinions. Accordingly, the California Court of Appeal correctly applied *Jackson* in affirming Smith's conviction.

Because our court's rejection of qualified expert opinions distorts *Jackson* analysis and contravenes AEDPA's required deference, I respectfully dissent from the denial of rehearing en banc.

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[6]*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993).

[7]*People v. Kelly*, 549 P.2d 1240, 1244 (1976) (citing *Frye v. United States*, 239 F. 1013, 1014 (D.C. Cir. 1923)).